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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-25

BERNADINE ROSE BROKENLEG,

Petitioner,

v.

BERNARD C. BUTTS, SR., *et ux.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, EL PASO

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No.

BERNADINE ROSE BROKENLEG,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, EL PASO

Petitioner, Bernadine Rose Brokenleg, respectfully prays that a Writ of Certiorari be granted to review the judgment and opinion of the Texas Court of Civil Appeals, El Paso, entered in this case on November 16, 1977.

OPINIONS BELOW

The order of the Texas Supreme Court refusing Petitioner's application for a writ of error is unreported. It is printed in Appendix B. The opinion of the Texas Court

of Civil Appeals, El Paso is reported at 559 S.W.2d 853 (1977) and is printed in Appendix C. The judgment and the order overruling Petitioner's motion for a rehearing of the Texas Court of Civil Appeals, El Paso are unreported. They are also printed in Appendix C. The Findings of Fact and Conclusions of Law and Decree of Termination (judgment) of the Texas 109th Judicial District Court are unreported. They are printed in Appendix D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1257(3). The order of the Supreme Court of the State of Texas refusing Petitioner's application for a writ of error was entered on April 5, 1978. In accordance with 28 U.S.C. 2101(c), this petition for a writ of certiorari is due on or before July 5, 1978. The judgment sought to be reviewed was dated and entered on November 16, 1977. Rehearing was denied on December 21, 1977.

QUESTIONS PRESENTED

I.

WHETHER A FIT PARENT CAN BE DENIED THE CUSTODY OF A CHILD FOR THE SOLE REASON THAT THE AWARD OF CUSTODY TO A NON-PARENT IS THOUGHT TO BE IN THE CHILD'S BEST INTEREST.

II.

WHETHER A FIT PARENT CAN BE DENIED THE CUSTODY OF A CHILD BECAUSE (1) THE PARENT WOULD RAISE THE CHILD ON AN INDIAN RESERVATION, AND (2) A CHILD WITH NON-INDIAN PHYSICAL FEATURES SHOULD NOT BE RAISED IN AN ENVIRONMENT CONSISTING OF PRIMARILY INDIAN PEOPLE.

III.

WHETHER A FIT PARENT CAN BE DENIED THE CUSTODY OF A CHILD ON EVIDENCE SUPPORTED BY ONLY A MERE PREPONDERANCE OF THE EVIDENCE.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution and V.T.C.A. Family Code §§ 11.15, 14.01 (a), (b), 14.02(a), (b), 14.03, 14.04, 14.07(a), 14.08, 15.02, and 15.05 are set out in Appendix A at pp. 1a-7a.

STATEMENT OF THE CASE

Bernadine Rose Brokenleg, the Petitioner, is the natural mother of Tiffany Lynette Butts, an eight-year-old child. Bernard C. Butts, Sr. and his wife Ila Marie Butts, Respondents, are Tiffany's paternal grandparents. Tiffany was born during Petitioner's marriage to Bernard C. Butts, Jr., Tiffany's natural father. Tiffany is Petitioner's only child. Petitioner had continuous custody of Tiffany from birth until Tiffany was approximately four years old. Petitioner had sole custody of Tiffany for most of this four-year period.

Petitioner and her child are enrolled members of the Rosebud Sioux Tribe of Indians of South Dakota. Respondents are non-Indian.

On April 24, 1975, Respondents petitioned the 109th Judicial District Court of Winkler County, Texas to terminate the parental rights of Petitioner and Bernard C. Butts, Jr. to Tiffany. The petition alleged that Petitioner abandoned and neglected Tiffany in the terms of V.T.C.A. Family Code § 15.02(1)(B), (E) and (F).[1] The petition also alleged that it would be in Tiffany's best interest to terminate parental rights and appoint Respondents as Tiffany's managing conservators. See V.T.C.A. Family Code §§ 15.02(2) and 15.05(b).

[1] Eugene L. Smith, one of the drafters of the Texas Family Code, states that § 15.02(1)(B) describes conduct of abandonment and that §§ 15.02(1)(E) and (F) concern neglect of the child. 5 Tex.Tech.L.R. 437, 439-440.

Under V.T.C.A. Family Code § 11.15 Respondents were required to prove these allegations by only a preponderance of the evidence.

On November 8, 1976, the District Court held a hearing on the petition. At the hearing, the Court stated that Petitioner's fitness as a mother was not in question. Statement of Facts, p. 101. On December 3, 1976 the District Court entered a decree terminating the parental rights of Petitioner and Bernard C. Butts, Jr. to Tiffany. The decree also appointed Respondents as Tiffany's managing conservators.

In its decree, the Court found that Petitioner engaged in the conduct defined in V.T.C.A. Family Code § 15.02 (1)(B) and (F), and that termination of Petitioner's parental rights and the appointment of Respondents as Tiffany's managing conservators were in Tiffany's best interest.

On January 17, 1977, the District Court overruled Petitioner's motion for a new trial.

On February 22, 1977, the District Court entered findings of fact and conclusions of law. Excepting findings of fact 6 and 7, the findings of fact and conclusions of law essentially reiterated the findings contained in the decree of termination.

Findings of fact 6 and 7 state that (1) to return Tiffany to Petitioner's custody would mean that Tiffany would be raised on an Indian reservation; (2) to raise Tiffany on an Indian reservation would be detrimental to and endanger her physical and emotional well-being; (3) Tiffany has non-Indian physical features; (4) to raise Tiffany in "an environment consisting of primarily Indian people would subject her to being reared under unnatural conditions that would be detrimental and endanger her emotional well-being."

Bernadine Rose Brokenleg appealed, assigning as error,[2] *inter alia*, the District Court's determination that the parental rights of a fit parent can be terminated and a fit parent denied the custody of a child; and the failure of the District Court to apply a clear and convincing evidence standard. In addition, the District Court's reliance on findings of fact 6 and 7 to support its judgment was made a point of error in Petitioner's brief on appeal.[3]

On November 16, 1977, the Court of Civil Appeals of Texas, El Paso filed its opinion and entered its judg-

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[2]Rule 374 of the Texas Rules of Civil Procedure provides, *inter alia*, that "the motion for new trial . . . shall constitute the assignments of error on appeal or writ of error." All of Petitioner's points of error, except those pertaining to the District Court's findings of fact 6 and 7, were included in Petitioner's original motion for a new trial. See Transcript, pp. 67, 70, 72, 82, 83. Except for issues raised by findings of fact 6 and 7, the issues of error were actually first raised, in substance, in Petitioner's written trial summation argument offered immediately following the close of evidence. See Transcript, pp. 33-34. All of Petitioner's points of error on the federal questions raised in this Petition were argued in Petitioner's brief on appeal.

[3]The error involving the District Court's findings of fact 6 and 7 were first raised in Petitioner's brief on appeal to the Texas Court of Civil Appeals. Rule 374 of the Texas Rules of Civil Procedure provides, *inter alia*, that "complaint of the action of the court on all matters arising under circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary." Rule 324 of the Texas Rules of Civil Procedure provides, *inter alia:* ". . . nor shall a motion for new trial be required in a non-jury case or in a case where the appeal is based upon some error of the trial court arising after its action upon the motion for new trial." The trial in the District Court below was a non-jury trial. Petitioner's motion for new trial was overruled on January 17, 1977. The findings of fact and conclusions of law were rendered by the District Court on February 22, 1977. The issues of error raised by findings of fact 6 and 7 were first expressed by the District Court in the findings of fact.

ment reversing that part of the District Court judgment terminating the parent-child relationship between Petitioner and Tiffany. The Court of Civil Appeals affirmed that part of the District Court judgment awarding custody of Tiffany to Respondents. The Court found no evidence that Petitioner is an unfit mother but concluded that Respondents' custody of Tiffany is nevertheless in the child's best interest.[4] The Court ruled that "even though there is no proof or finding of unfitness on the part of the parent to remain as a parent," the fit parent can be deprived of custody on a finding that non-parental custody is in the best interest of the child. 559 S.W.2d at 857.

The Court of Civil Appeals declined to rule on Petitioner's point of error that because her right to Tiffany's custody is a fundamental liberty safeguarded by the United States Constitution, Texas is required to use a means less drastic than a denial of custody to further its interest in protecting Tiffany's welfare.[5] The Court further declined to rule on Petitioner's point of error that by preventing a fit parent from exercising her constitutional right to the custody of her child,[6] the District Court's application of V.T.C.A. Family Code § 15.05(c) was overbroad.

[4]Affirmance of the District Court managing conservatorship appointment is implicit in the Court of Civil Appeals' opinion and explicit in its judgment.

[5]The Court stated that it would decline to rule on this point of error. In ruling that a fit parent can be denied custody, the Court did, in effect, rule on the point. The point of error regarding "least drastic means" was implicitly raised in Petitioner's trial summation argument and was first assigned as error in Petitioner's original motion for a new trial. See Transcript, pp. 67, 70. The error was also argued in Petitioner's brief on appeal.

[6]The overbreadth point of error was assigned as error in Petitioner's original and amended motion for a new trial and argued in the brief on appeal. See Transcript, pp. 67, 70, 72, 82, 83.

The Court also declined to rule on Petitioner's point of error that V.T.C.A. Family Code § 11.15 violates the due process of the law because it requires only a preponderance of the evidence standard in suits affecting the parent-child custody relationship.[7]

The Court of Civil Appeals made no express rulings on Petitioner's points of error regarding the District Court's findings of fact 6 and 7.[8]

On December 21, 1977, the Court of Civil Appeals denied Petitioner's motion for a rehearing.

Petitioner applied to the Supreme Court of the State of Texas for a writ of error from that part of the Court of Civil Appeals' judgment which affirmed the District Court custody award and appointed Respondents as Tiffany's managing conservators. The application assigned as error, the Court of Civil Appeals' express and implied rulings that (1) a fit parent can be denied child custody for the sole reason that non-parental custody is thought to be in the child's best interest, (2) a fit parent can be denied the custody of a child because the parent would raise the child in an Indian environment on an Indian reservation, and (3) a judgment denying custody of a child to a fit parent can be based on a preponderance of the evidence.

[7]The standard of proof point of error was assigned as error in Petitioner's original motion for a new trial and argued in the brief on appeal. See Transcript, p. 72.

[8]The Court of Civil Appeals implicitly adopted the District Court's findings of fact 6 and 7 by affirming the District Court custody award as in the best interest of the child. Since the Court of Civil Appeals rejected all other District Court findings of fact, only findings of fact 6 and 7 remain and are the only findings relevant to the best interest issue.

On April 5, 1978, the Texas Supreme Court refused Petitioner's application for a writ of error and found no reversible error in the judgment and opinion of the Court of Civil Appeals.[9]

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE TEXAS COURT OF CIVIL APPEALS CONFLICTS WITH THIS COURT'S RULINGS IN STANLEY V. ILLINOIS AND QUILLOIN V. WALCOTT THAT A FIT PARENT IS ENTITLED TO THE CUSTODY OF ITS CHILD.

The Texas Court of Civil Appeals held that "even though there is no proof or finding of unfitness on the part of the parent," the parent can be denied custody of a child for the sole reason that the award of custody to a non-parent is in the child's best interest. 559 S.W.2d at 857-858.[10] This holding is completely inconsistent

[9] Rule 483 of the Texas Rules of Civil Procedure provides, *inter alia*, that "In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation 'Refused. No Reversible Error'."

[10] The Texas District Court apparently based its best interest determination on findings that Petitioner abandoned and neglected her child in the terms of V.T.C.A. Family Code § 15.02(1)(B) and (F), and that, if the child were to be raised on an Indian reservation, there would be danger to its well-being. See Findings of Fact and Conclusion of Law, Appendix D, pp. 22a-24a.

The Court of Civil Appeals rejected all of the District Court's abandonment and neglect findings but nevertheless affirmed the District Court custody award on the ground that Respondents have "a more stable home" than Petitioner, 559 S.W.2d at 857, a "fact" not expressed by the District Court. The Court of Civil Appeals offers no explanation of the evidence relied on to support its comparison of the stability of Petitioner's and Respondents' respective homes, nor does the Court find that Petitioner's home is

[footnote continued]

with the decisions of this Court in *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Quilloin v. Walcott*, ____ U.S. ____, 54 L.Ed.2d 511 (1978).[11]

In *Stanley*, the Court ruled, in effect, that parents are constitutionally entitled to a determination of unfitness

unstable or that Petitioner is unable to "provide for the physical, mental, and spiritual needs of Tiffany." *Id.*

The Court of Civil Appeals' best interest determination leads to the inescapable conclusion that the Court has merely sought to compare Petitioner's and Respondents' respective home environments and found a more delicate way to express the District Court's Findings of Fact 6 and 7. Consistent with *Stanley* and *Quilloin*, Petitioner's "essential" and "basic civil right" to raise her child cannot be abrogated on a mere insubstantial, and unsubstantiated comparison of the stability of the parental and a non-parental home.

Comparatively, there is always "a more stable home" for any child. Absent findings of neglect, abuse, or dependency, or other unfitness, the Due Process Clause requires the award of custody to a parent even if the parental home is not the optimum environment for the child.

[11] The holding is also inconsistent with the instruction of this Court that even when a compelling state interest justifies interference with the exercise of fundamental rights, the state must use the least drastic means to accomplish its end. *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The least drastic means test required the courts below to seek a means to achieve parental custody. V.T.C.A. Family Code Chapter 14 offers less drastic means than the appointment of Respondents as managing conservators. These include the appointment of Petitioner as a managing conservator under § 14.01, or as a possessory conservator under § 14.03, or the issuance of another order under § 15.05(c).

The Court of Civil Appeals' holding reveals that V.T.C.A. Family Code § 15.05(c) is overbroad on its face and as applied. The statute sweeps within its prohibitions parental conduct and home environment circumstances which are not constitutionally or statutorily prohibited and deters Petitioner's exercise of her constitutional right to the custody of her child. *Broadrick v. Oklahoma*, 413 U.S. 601, 612-613 (1973); *Grayned v. City of Rockford*, 408 U.S. 104, 114-115 (1972).

before their children are removed from their custody. 405 U.S. at 658.[12] A finding of unfitness must be supported by proof of neglect. *Id.* Here, as in *Stanley*, there is nothing in the record indicating that Petitioner is or has been a neglectful parent. 559 S.W.2d at 857-858.

In *Quilloin*, the Court held:

> We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest'. 54 L.Ed.2d at 520.

Accord, Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 862-863 (1977) (Stewart, J. concurring, with whom Burger, C.J., and Rehnquist, J., joined.)

The Texas Court of Civil Appeals has ruled that petitioner is fit but that the best interest of the child, standing as the sole reason, supports the conclusion that Petitioner should be denied custody.[13] 559 S.W.2d at 858.

[12] According to Eugene L. Smith, one of the drafters of the Texas Family Code, the purpose of Chapter 15 is to authorize non-parental "permanent control of a child when the parents are unfit because of abandonment, abuse, or neglect." 5 Tex.Tech.L.R. 437, 438. The Court of Civil Appeals' ruling is inconsistent with this purpose.

[13] The denial of custody to Petitioner and the appointment of Respondents as managing conservators virtually constitutes a *de facto* termination of parental rights. Under V.T.C.A. Family Code § 14.08(c)(1), in order to obtain possession of or *any access* to her child, Petitioner must prove that "the circumstances of the child or parent have so materially and substantially changed since the entry of the [managing conservatorship] order . . . that the retention of the present managing conservator would be injurious

[footnote continued]

II.

THE DECISION OF THE COURTS BELOW TO DENY PETITIONER THE CUSTODY OF HER CHILD IS GROUNDED ON FINDINGS OF FACT THAT ARE CONSTITUTIONALLY IMPERMISSIBLE ACCORDING TO APPLICABLE DECISIONS OF THIS COURT.

The Texas District Court decision to appoint Respondents as the managing conservators of Petitioner's child was based entirely on findings of fact 6 and 7.[14] Essentially, the District Court found that to be raised in an Indian populated environment on an Indian reservation was not in Tiffany's best interest. The Court of Civil Appeals agreed.[15] The findings are not based on any evidence adduced at trial.

Substantial infringements of constitutional rights inhere in the District Court findings of fact 6 and 7.

to the welfare of the child and that the appointment of the new managing conservator would be a positive improvement for the child." As a prerequisite to a § 14.08 hearing to change the designation of managing conservator, Petitioner must allege and substantiate "that the child's present environment may endanger his physical health or significantly impair his emotional development." V.T.C.A. Family Code § 14.08(d)(1) and (e). And, the modification of a managing conservatorship order is wholly in the discretion of the court regardless of the evidence adduced at a modification hearing.

Section 14.08 clearly imposes an extraordinary, if not impossible, burden of proof on a fit parent petitioning a court for possession of or access to a child currently in the custody of a non-parent managing conservator. The burden violates Petitioner's custody right under the Due Process Clause.

[14] The Court of Civil Appeals found no evidence to support any of the other District Court findings.

[15] See footnote 10, *supra*.

Implicit in findings of fact 6 and 7 is a finding that Petitioner's custody of Tiffany would cause no detriment or endangerment to the child if Petitioner would raise the child away from an Indian reservation and away from an Indian community.

Findings of fact 6 and 7 deny Petitioner the equal protection of the laws. The findings operate automatically and arbitrarily. If a child, even an Indian child like Tiffany, is to be reared by its parent on an Indian reservation, a conclusive presumption arises that there will be detriment and danger to the physical and emotional well-being of the child. Conversely, the findings also conclusively presume that physical and emotional benefit will automatically inure to a child raised in a community where the primary population group racially resembles the child. Thus, the findings automatically foreclose parental custody when the parent chooses to raise a child on an Indian reservation, especially when that child has non-Indian physical features. These conclusive presumptions preclude inquiry into the individual circumstances of the parent and the best interest of a particular child. Such a situation is repugnant to the Equal Protection Clause.[16] *Stanley v. Illinois, supra,* 405 U.S. at 655-656.

The conclusive presumption that to be raised on an Indian reservation is against the best interest of all children, and those with non-Indian physical features, in particular, is also repugnant to the Due Process Clause, since it must inevitably result in decisions contrary to the best interest of individual children. *Stanley v. Illinois, supra,* 405 U.S. at 653-655; *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 644-645 (1974). No compelling or substantial government interest supports the automatic withholding of a child from parental custody on the basis of the racial environment in which the parent resides and chooses to raise the child.

Finding of fact 7 also constitutes an invidious discrimination in violation of the Equal Protection Clause. The

[16] The arbitrariness and threat to the best interest of a child and to parental custody rights inherent in the presumption is emphasized by the fact, in evidence, that Petitioner raised her child for 15 months on the Rosebud Sioux Indian Reservation without any negative physical or emotional consequences to the child.

finding discriminates against parents who wish to raise on an Indian reservation their children, who have non-Indian physical features. Parents who wish to raise on an Indian reservation their children who have Indian physical features can apparently do so consistent with finding of fact 7. The fact that the same parents can bear children exhibiting different racial physical features serves to underscore that finding of fact 7 is based on racial considerations totally irrelevant to any legitimate purpose of the state to protect children from parental abuse or neglect.[17] *San Antonio School District v. Rodriguez,* 411 U.S. 1, 17 (1973); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Korematsu v. United States,* 323 U.S. 214, 216 (1944). When racial factors are decisive in the custody placement of a child, the law "promoted not the child's best interests but only the integrity of race" in the custody decision. *Compos v. McKeithen,* 341 F.Supp. 264, 267 (E.D.La. 1973). *Accord, Roe v. Conn,* 417 F.Supp. 769, 773, n.16 (M.D.Ala. 1976).

Discrimination in violation of the Equal Protection Clause is also integral to finding of fact 6. If, in order to secure the enjoyment of a right, disadvantageous burdens are placed entirely on one class or group that are not required of any other class or group, there is discrimination which denies the equal protection of the laws to the burdened group. *Dunn v. Blumstein, supra,* 405 U.S. at 342; *Brown v. Board of Education,* 347 U.S. 483 (1954). In order for Petitioner and other reservation resident Indian parents to secure the right to have custody of their children, finding of fact 6 requires them to reside in an off-Indian reservation location. No other group of

[17] Finding of fact 7 clearly will inhibit the freedom of Indians to marry interracially and thus bear interracial children. Upon divorce or other custody proceeding, the reservation resident Indian parent of an interracial child who has non-Indian physical features is automatically barred from custody. *Loving v. Virginia,* 388 U.S. 1 (1967).

parents is required to leave a locality or community of residence and reside in another location as a precondition to obtaining the custody of a child. No compelling or substantial government interest supports this precondition.

The residency requirement imposed on Petitioner by findings of fact 6 and 7 as a precondition to custody also abridges Petitioner's freedom of travel, a privilege of citizenship under the Fourteenth Amendment. Freedom of travel includes "freedom to enter and abide in any State in the Union." *Dunn v. Blumstein, supra,* 405 U.S. at 338. *Accord, Oregon v. Mitchell,* 400 U.S. 112, 285 (1970) (Stewart, J., concurring and dissenting, with whom Burger, C.J., and Blackmun, J., joined); *Shapiro v. Thompson,* 394 U.S. 618, 629-631 (1969). The freedom of travel obviously embraces the freedom to choose an abode in any area or region of a state, including on an Indian reservation.

The parental decision of where, in what way, and under what circumstances to raise a child is a most fundamental and personal liberty, long recognized as receiving protection under the Due Process Clause from unwarranted governmental intrusion. *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). See also *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 503-506 (1977); *Cleveland Board of Education v. LaFleur, supra,* 414 U.S. at 639-640; *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). Cf. *Wisconsin v. Yoder,* 406 U.S. 205, 217-219, 232 (1972). Recently the Court emphasized that parental child rearing decisions are part of a "right of personal privacy" protected by the Due Process Clause. *Carey v. Population Services International,* 431 U.S. 678, 684-685 (1977). See also *Zablocki v. Redhail,*

____ U.S. ____ , 54 L.Ed.2d 618, 629-631 (1978). Petitioner has a fundamental right to raise her child in the way of life of the Rosebud Sioux Indian society from which she and her child receive ethnic and cultural identity.

The Due Process Clause requires that "when the government intrudes on choices concerning family living arrangements . . . the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation" must be examined. *Moore v. City of East Cleveland, Ohio, supra,* 431 U.S. at 499. The governmental interests advanced in V.T.C.A. Family Code Chapter 15 are the protection of children from parental abuse, abandonment, and neglect. These interests are not served by withholding the custody of a child from a fit parent for the reasons expressed in findings of fact 6 and 7 or for the home stability comparison reason expressed by the Court of Civil Appeals.[18]

III.

THE PREPONDERANCE OF THE EVIDENCE STANDARD USED BY THE COURTS BELOW TO DENY A FIT PARENT CUSTODY OF HER CHILD IS NOT IN ACCORDANCE WITH APPLICABLE DECISIONS OF THIS COURT.

The Texas Court of Civil Appeals and the District Court both used a preponderance of the evidence standard to support their respective custody decisions. The standard is required by V.T.C.A. Family Code § 11.15.

In re Winship, 397 U.S. 358 (1970), established that when a child faces loss of liberty for a law violation, due process requires that the facts against the child be proved beyond a reasonable doubt. *Winship* ruled that, although such proceedings are concerned with "a child's best

[18] See footnote 10, *supra.*

interest," the liberty right at stake requires the highest standard of proof. 397 U.S. at 367. Justice Harlan, concurring, explained that "the choice of the standard for a particular adjudication does . . . reflect a very fundamental assessment of the comparative social costs of erroneous factual determination." 397 U.S. at 370. *Accord, Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961). The Court has further explained that "the extent to which procedural due process must be afforded . . . is influenced by the extent to which [an individual] may be 'condemned to suffer a grievous loss'." *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). The "social costs" and "grievous loss" of erring in the unnecessary dismemberment of a family are without parallel. They are far more severe than the consequences of continuing parental custody when a child might be better off separated from its parent. For this reason, and because the right of a parent to the custody and companionship of its child is fundamental, a standard of proof which permits the fact-finder to err on one side as easily as the other offends the very essence of the due process clause. *In re Winship, supra. Accord, Sims v. State Department of Public Welfare of the State of Texas*, 438 F.Supp. 1179, 1195 (S.D.Tex. 1977); *Alsager v. District Court*, 406 F.Supp. 10, 25 (S.D.Iowa 1975), aff'd on oth. grnds., 545 F.2d 1137 (CA8 1976). When a court must determine whether to remove a child from the custody of its parent for any period, but one of short duration in the event of an emergency, the interests at stake should require use of the beyond a reasonable doubt standard. Minimally, due process requires the intermediate clear and convincing evidence standard.[19] *Id.*

[19]Where, as here, significant constitutionally protected rights are at stake (e.g., deportation or involuntary civil commitment to a [footnote continued]

CONCLUSION

For the reasons set forth in this petition, Bernadine Rose Brokenleg, Petitioner, urges this Court to issue a writ of certiorari to the Court of Civil Appeals of Texas, El Paso and also to reverse summarily the custody decision of that Court and the District Court on authority of *Quilloin v. Walcott, supra,* and *Stanley v. Illinois, supra.*

Respectfully submitted,

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Attorney for Petitioner

mental hospital), the clear and convincing evidence standard is traditionally required. *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966); *Lynch v. Baxley*, 386 F.Supp. 378 (M.D. Ala. 1974).

APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION,

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V.T.C.A. FAMILY CODE

[56] § 11.15. Findings

The court's findings shall be based on a preponderance of the evidence under rules generally applicable to civil cases.

* * *

[68] Section 14.01 Court appointment of Managing Conservator

(a) In any suit affecting the parent-child relationship, the court may appoint a managing conservator, who must be a suitable, competent adult, or a parent, or an authorized agency. If the court finds that the parents are or will be separated, the court shall appoint a managing conservator.

(b) A parent shall be appointed managing conservator of the child unless the court finds that appointment of the parent would not [69] be in the best interest of the

child. In determining which parent to appoint as managing conservator, the court shall consider the qualifications of the respective parents without regard to the sex of the parent.

* * *

[96] § 14.02. **Rights, Privileges, Duties, and Powers of Managing Conservator**

(a) A parent appointed managing conservator of the child retains all the rights, privileges, duties, and powers of a parent to the exclusion of the other parent, subject to the rights, privileges, duties, and powers of a possessory conservator as provided in Section 14.04 of this code and to any limitation imposed by court order in allowing access to the child.

(b) A managing conservator who is not the parent of the child has the following rights, privileges, duties, and powers, subject to the rights, privileges, duties, and powers of a possessory conservator as provided in Section 14.04 of this code and to any limitation imposed by court order in allowing access to the child:

(1) the right to have physical possession of the child and to establish its legal domicile;

(2) the duty of care, control, protection, moral and religious training, and reasonable discipline of the child;

(3) the duty to provide the child with clothing, food, shelter, and education;

(4) the right to the services and earnings of the child;

(5) the power to consent to marriage, to enlistment in the armed forces of the United States, and to medical, psychiatric, and surgical treatment;

(6) the power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

[97] (7) the power to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child; and

(8) if the parent-child relationship has been terminated with respect to the parents, or only living parent, or if there is no living parent, the power to consent to the adoption of the child and to make any other decision concerning the child that a parent could make.

* * *

[99] § 14.03. **Possession of and Access to Child**

(a) If a managing conservator is appointed, the court may appoint one or more possessory conservators and set the time and conditions for possession of or access to the child by the possessory conservators and others.

(b) On the appointment of a possessory conservator, the court shall prescribe the rights, privileges, duties, and powers of the possessory conservator.

(c) The court may not deny possession of or access to a child to either or both parents unless it finds that parental possession or access is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child.

(d) The court may grant reasonable visitation rights to either the maternal or paternal grandparents of the child and issue any necessary orders to enforce said decree.

[103] § 14.04. **Rights, Privileges, Duties, and Powers of Possessory Conservator**

A possessory conservator has the following rights, privileges, duties, and powers during the period of possession, subject to any limitations expressed in the decree:

(1) the duty of care, control, protection, and reasonable discipline of the child;

(2) the duty to provide the child with clothing, food, and shelter;

(3) the power to consent to medical and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and

(4) any other right, privilege, duty, or power of a managing conservator expressly granted in the decree awarding possession of the child.

* * *

[127] § 14.07. **Best Interest of Child**

(a) The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child. If the child is 14 years of age or older, he may, by writing filed with the court, choose the managing conservator, subject to the approval of the court.

(b) In determining the best interest of the child, the court shall consider the circumstances of the parents.

* * *

[52] CUMULATIVE ANNUAL POCKET PART FOR USE IN 1978

§ 14.08. **Modification of Order**

(a) A court order or the portion of a decree that provides for the support of a child or the appointment

of a conservator or that sets the terms and conditions of conservatorship for, support for, or access to a child may be modified only by the filing of a motion in the court having jurisdiction of the suit affecting the parent-child relationship. Any party affected by the order or the portion of the decree to be modified may file the motion.

* * *

[53] (c) After a hearing, the court may modify an order or portion of a decree that:

(1) designates a managing conservator if the circumstances of the child or parent have so materially and substantially changed since the entry of the order or decree to be modified that the retention of the present managing conservator would be injurious to the welfare of the child and that the appointment of the new managing conservator would be a positive improvement for the child; or

* * *

(d) If the motion is filed for the purpose of changing the designation of the managing conservator and is filed within one year after the date of issuance of the order or decree to be modified, there shall be attached to the motion an affidavit executed by the person making the motion. The affidavit must contain at least one of the following allegations along with the supportive facts:

(1) that the child's present environment may endanger his physical health or significantly impair his emotional development; or

(2) that the managing conservator is the person seeking the modification or consents to the modification, and the modification is in the best interest of the child.

(e) On the filing of a motion to which the provisions of Subsection (d) of this section apply, the court shall deny the motion and refuse to schedule a hearing unless the court determines, on the basis of the affidavit, that adequate facts to support an allegation listed in Subdivision (1) or (2) of Subsection (d) of this section are stated in the affidavit. If the court determines that the facts stated are adequate to support an allegation, a time and place for the hearing shall be set.

[73] CUMULATIVE ANNUAL POCKET PART FOR USE IN 1978

§ 15.02. Involuntary Termination of Parental Rights

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

* * *

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or

* * *

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition;

* * *

(2) termination is in the best interest of the child.

* * *

[236] **§ 15.05. Decree**

(a) If the court finds grounds for termination of the parent-child relationship, it shall enter a decree terminating the parent-child relationship.

(b) If the court terminates the parent-child relationship with respect to both parents or to the only living parent, the court shall appoint a suitable, competent adult or authorized agency as managing conservator of the child. * * *

(c) If the court does not order termination of the parent-child relationship, it shall:

(1) dismiss the petition; or

(2) enter any order considered to be in the best interest of the child.

APPENDIX B

IN THE SUPREME COURT OF TEXAS
FROM WINKLER COUNTY, EIGHTH DISTRICT

No. B-7350

BERNADINE ROSE BROKENLEG,

v.

BERNARD C. BUTTS, SR., ET UX.,

Application of petitioner for writ of error to the Court of Civil Appeals for the EIGHTH Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant BERNADINE ROSE BROKENLEG pay all costs incurred on this application.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 9th day of June, 1978.

GARSON R. JACKSON, Clerk
/s/ By Richard P. Braun,
Deputy.
RICHARD P. BRAUN

APPENDIX C

COURT OF CIVIL APPEALS
EL PASO

No. 6638

BERNADINE ROSE BROKENLEG,
v.
BERNARD C. BUTTS, SR., ET UX.,
from Winkler.

JUDGMENT

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in that part of the judgment relating to the termination of the parent-child relationship between Respondent, Bernadine Rose Brokenleg, and the child, Tiffany Lynette Butts, it is therefore ordered, adjudged and decreed that that part of the judgment be reversed and this Court proceeded to render such judgment as to that part of the judgment as should have been rendered by the Court below, to-wit:

IT IS THEREFORE, on this 2nd day of December, 1976, ORDERED AND DECREED that the parent-child relationship between Respondent Mother, Bernadine Rose Brokenleg, and the child, Tiffany Lynette Butts, be, and the same is hereby, continued.

And because it is the opinion of this Court that there was no other error in the judgment except as herein reversed and rendered in part, it is therefore ordered,

adjudged and decreed that the judgment of the trial Court be in all other respects affirmed, in accordance with the opinion of this Court.

It is further ordered, adjudged and decreed by this Court that the appellant, Bernadine Rose Brokenleg, and the appellees, Bernard C. Butts, Sr., and wife, Ila Marie Butts, each pay one-half (½) of all costs in this behalf expended and incurred, both in this Court and in the Court below, for which let execution issue, and this decision be certified below for observance.

COURT OF CIVIL APPEALS
EL PASO

No. 6638

BERNADINE ROSE BROKENLEG,
Appellant,
v.
BERNARD C. BUTTS, SR., ET UX.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF
WINKLER COUNTY, TEXAS.

OPINION

This appeal is from a judgment terminating the parental rights of a father and mother and awarding custody of their seven-year-old daughter to her paternal grand-

parents. The father voluntarily relinquished his rights to the child and there being no appeal from that part of the judgment terminating his rights, that part of the judgment has become final. The mother appeals from that part of the judgment terminating her rights and as to that part of the judgment we reverse and render. We affirm that part of the judgment which finds that the best interest of the child will be served by appointing the grandparents as managing conservators.

The marriage between Bernard C. Butts, Jr., and Bernadine Rose Brokenleg was annulled when their only child, Tiffany, was eighteen months old. The mother and child continued to live in California for several months and then in May, 1972, they moved to Parmelee, South Dakota, and since that time Bernadine has lived on the Rosebud Sioux Indian Reservation, she being a full-blooded Sioux Indian. In July, 1973, Mr. and Mrs. Bernard C. Butts, Sr., Appellees, and their son, Bernard C. Butts, Jr., went to South Dakota and visited Bernadine and Tiffany, whom they had asked to go with them on their vacation. Bernadine was unable to go but agreed that Tiffany could go with her relatives. There is a dispute in the testimony as to whether or not the grandparents were going to keep Tiffany after the vacation or whether she was to be returned to her mother on the Reservation. In fact, the Appellees took Tiffany to their home in Kermit, Texas, following the vacation and she has lived with them since that time.

Bernadine visited her daughter in Kermit in December, 1973, again in December, 1975, and in August, 1976. She also called and talked to Tiffany on the telephone several times each year, wrote to her occasionally, and left $50.00 for her support on the last visit. Bernadine was employed as a secretary at $2.00 per hour from November, 1973, until April, 1974. She was unemployed until

going to work as a teacher's aide at $2.30 per hour in August, 1974, although there is some evidence in the record that that job did not begin until February, 1975. Following an accident, she was unemployed from May, 1975, through August, 1975. At the time of trial, she was continuing to work as a teacher's aide and also earned $200.00 per month as a part-time tutor of college students.

Mr. Butts, Sr., is a production foreman for an oil company and his wife is circulation manager for a weekly newspaper. Together they earn over $2,000.00 per month. They have a home in Kermit in which Tiffany has her own bedroom. She is doing well in school and attends church regularly. She is well-fed and clothed and receives good medical attention when needed. Apparently, she is a happy, well-adjusted child, who testified in camera that she desires to stay with her grandparents.

Although Bernadine testified that she had adequate housing for her daughter on the Reservation, Appellees said the house was dirty and without adequate bathroom facilities which resulted in the need for an outhouse, and that when Tiffany was bathed, the dogs were in and out of the water. They testified that when they picked Tiffany up in July, 1973, she had a cold, tonsillitis, and ticks in her hair.

A psychiatrist testified that Bernadine was a competent mother and the best interest of a child would be served by placing custody with the mother. Two tribal officers testified in behalf of Bernadine and said she had a good reputation and that Tiffany was a normal child while living on the Reservation and would be well accepted now.

The trial Court filed findings of fact and conclusions of law. It found that Bernadine left Tiffany in the posses-

sion of her grandparents in July, 1973, without expressing an intent to return, and that Bernadine at no time provided adequate support, although having adequate financial resources to do so. It also found that it would be detrimental and would endanger the physical and emotional well-being of the child to return her to her mother's custody to be reared on the Indian Reservation. He concluded that Bernadine had voluntarily left the possession of the child with one not a parent without expressing an intent to return and without providing adequate support of the child, and that she remained away for a period of at least three months. It also concluded that she failed to support her child in accordance with her ability during a period of one year ending within six months of the date of the filing of the petition; and further that it would be in the best interest of the child to terminate the parental rights between Bernadine and Tiffany.

The Appellant attacks each of the trial Court's findings which serve as a basis for the judgment terminating the parental rights of the mother. The Appellees have filed no brief. The conclusions of law reflect that the trial Court has used both Section 15.02(1)(B) and (F)[1] as a basis for its decision. By her first point of error, Appellant attacks the findings made under Section 15.02(1)(B). As noted in Schiesser v. State, 544 S.W.2d 373 (Tex. 1976), there are four elements to this particular Section of the Family Code. They are: (1) voluntarily leaving the child; (2) without expressing an intent to return; (3) without providing for the adequate support of the child; and (4) remaining away for a period of at least three months. Of course, best interest of the child still remains an issue under Section 15.02(2). Although the Appellant attacks each of the findings as to the four elements mentioned above, we only need concern ourselves with the third one

[1] All Section references are to Texas Family Code.

which is a failure to provide for the adequate support of the child. As noted in the commentary following this Section of the Family Code in 8 Tex.Tech.L.Rev. 93 (1976), the standard for determining nonsupport under Subparagraph (B) is whether or not there is provision for adequate support of the child, rather than the parent's ability to support the child as in Subparagraph (F). The evidence in this case all reflects that the grandparents were able to and did in fact adequately support the child from the day Bernadine turned Tiffany over to them in July, 1973, until the date of trial. They testified themselves that they provided for all of her physical and medical needs and that she was well-fed, clothed, and in good health during the time she remained in their custody. Since the test under this Subparagraph is not whether or not the parent actually supported the child, but whether or not arrangements were made for the adequate support of the child, and the evidence is undisputed that they were, we conclude that Section 15.02(1)(B) is not applicable and we sustain Appellant's Point of Error No. I.

The second point of error attacks the trial Court's finding that Appellant failed to support her child in accordance with her ability during a period of one year ending within six months of the date of the filing of the petition under Section 15.02(1)(F). The petition was filed on April 21, 1975. Obviously, one year means twelve consecutive months. Thus, it was necessary that there be a period of twelve consecutive months sometime between October 21, 1973, and April 21, 1975, when the Appellant failed to provide support in accordance with her ability. The evidence is without dispute that during that entire period she made no contribution. But under the evidence as set forth above, we find no period of twelve consecutive months where she had an ability to contribute to the support of her child. Although she

worked from November, 1973, until April, 1974, without making any contribution, that period is far short of twelve consecutive months. If she did, in fact, go to work in August of 1974 and worked until April, 1975, the period of time is still short of twelve consecutive months. The evidence is without dispute that she was unemployed from April, 1974, at least until August, 1974, and perhaps even until February, 1975. There is no evidence that she had any ability to support her child during that period of time, and thus there are no twelve consecutive months for the period of one year during which she failed to support her child in accordance with her ability to do so as required by Section 15.02(1)(F). *Cawley v. Allums,* 518 S.W.2d 790 (Tex. 1975); *Wiley v. Spratlan,* 543 S.W.2d 349 (Tex. 1976).

Even if it should be determined that because of her earnings the Appellant had an ability to contribute to the support of her child for a period of one year ending within six months of the date of the filing of the petition in 1975, we conclude that under the holding in *Holley v. Adams,* 544 S.W.2d 367 (Tex. 1976), the mother's failure to support is excused. Of course, this issue of excuse must be considered under the holding in the *Holley* case under Section 15.02(2) in deciding the best interest of the child.

In the event we should be in error as to either of the first two points, we consider and sustain the third point of error which contends that the trial Court erred in finding that the best interest of the child requires termination of the parent-child relationship. The issue raises several difficult questions. First of all, we conclude that a parent-child relationship may be terminated even though there is no proof or finding of unfitness on the part of the parent to remain as a parent. Certainly,

this is the rule on the issue of custody. *Herrera v. Herrera,* 409 S.W.2d 395 (Tex. 1966); *Tiller v. Villasenor,* 426 S.W.2d 257 (Tex.Civ.App.—Houston [1st Dist.] 1968, no writ); *De Le Hoya v. Saldivar,* 513 S.W.2d 259 (Tex. Civ.App.—El Paso 1974, no writ). The same rule has been applied in cases involving termination of parent-child relationships. In the case of *In re R_D_P_* , 526 S.W.2d 135 (Tex.Civ.App.—Dallas 1975, no writ), the Court said:

> "Appellant contends that appellee has the burden of proving that the natural parent at the time of filing this action was an unfit parent. We cannot agree. Tex.Family Code Ann. Sec. 15.02 (Vernon 1975) places no such burden upon petitioner. Even precode decisions held that a court may terminate parental rights without finding that the parent is unfit, where it is in the best interest of the child. *McBrien v. Zacha,* 351 S.W.2d 101 (Tex.Civ.App.—Dallas 1961, writ ref'd n.r.e.); *Scozzari v. Curtis,* 398 S.W.2d 819 (Tex.Civ.App.—Fort Worth 1966, no writ)."

There are cases with language to the contrary. See *Hall v. Harris County Child Welfare Unit,* 533 S.W.2d 121 (Tex. Civ.App.—Houston [14th Dist.] 1976, no writ); and *D_F_ , v. State,* 525 S.W.2d 933 (Tex.Civ.App.—Houston [1st Dist.] 1975, no writ). But in *Holley v. Adams,* supra, and *Schiesser v. State,* supra, the Court makes no mention of such requirement and certainly the Statute does not indicate that "unfitness" is an issue in itself.

But in the *Holley* case, the Court lists eight factors which may, among others, be considered in deciding the best interest of the child. One of the factors listed is acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one, and this would seem to include the element of "unfitness." The difficulty of the issue lies in part in the fact that

most of the factors listed have some equal application to both the issue of custody and the issue of termination. For instance, the first factor listed in that opinion is the desire of the child. In this case, the seven-year-old child testified in camera that she did not want to go with her mother but preferred to stay in Kermit. That may be strong evidence on the custody issue, but questionable evidence on the termination issue. Certainly, the child did not testify that she never wanted to see her mother again. Another listed element is stability of the home. Undoubtedly, the evidence shows greater stability in the home of the grandparents who are well able to provide for the physical, mental and spiritual needs of Tiffany, and based upon such evidence we agree that custody was properly placed in the grandparents. But does the fact that Appellees have a more stable home for the care and custody of Tiffany mean she should have all relationships with her mother terminated even though the mother has on other occasions visited her daughter in that stable home without any apparent problems arising at the time? On the issue of unfitness, the trial Court has made no findings and did not consider that to be an issue in the case. Certainly, the evidence in this case would not have supported any affirmative finding had one been made. Likewise, the record is void of evidence indicating that visitations upon the part of the mother in the past have created any emotional or physical dangers which call for termination of the parent-child relationship.

The facts in this case are somewhat similar to those in the *Holley* case where the financial support from the mother was practically nil, visitations seldom, but the ability to support much stronger. In that case, the Court said:

> "However, as previously noted, any excuse for this failure to support is to be considered under best

> interest. A comparison of the facts of this case to the circumstances of *Heard v. Bauman*, supra, leads to the conclusion that the failure to support was excused. In the instant case David Adams testified that Nanci Holley voluntarily agreed to give him custody of the child during the course of the divorce proceedings in order to assure that the child would be provided adequate financial support. Nanci Holley was never ordered to make support payments. It was undisputed that the child had been properly cared for while in his father's custody and that David Adams and his wife never sought or wanted any financial support for the child from Nanci Holley. Therefore, Nanci Holley's duty to support her child was excused and the fact that the failure to support is excused is one of the factors to be considered in ascertaining the best interest of the child."

As the Court noted in *Wiley v. Spratlan*, supra, there is a substantial difference between suits for conservatorship, possession and support of children, and those to terminate a parent-child relationship, and the difference in the proceedings justifies the caution with which Courts have characteristically considered termination cases. While we conclude that all of the factors listed as bearing on the best interest of the child in the Holley case support the trial Court's conclusion that custody should be awarded to the grandparents in this case, we also conclude that none of those factors compel termination of the mother's rights as being in the best interest of the child. The father's rights have been terminated. The grandparents have not testified as to any intention to adopt their granddaughter, no evidence has been offered that the mother is unfit, and we find no compelling reason to terminate "The natural right which exists

between parents and their children [and which] is one of constitutional dimensions." *Wiley v. Spratlan*, supra.

The foregoing makes it unnecessary for us to pass on the Appellant's last two points of error.

November 16, 1977 /s/ Max N. Osborn
MAX N. OSBORN,
Associate Justice.

COURT OF CIVIL APPEALS

EL PASO

No. 6638

BERNADINE ROSE BROKENLEG,

APPELLANT,

v.

BERNARD C. BUTTS, SR., ET UX.,

APPELLEES.

Appeal from the District Court
of Winkler County, Texas.

December 21, 1978. [sic] * This day came on to be heard appellant's motion for rehearing, and the Court having considered the same is of the opinion that the same should be overruled.

*This is a typographical error. It should read "December 21, 1977."

Wherefore, it is considered, adjudged and ordered that appellant's said motion for rehearing be, and the same is hereby, overruled.

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

I, ANNE D. RAY, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of Texas, do hereby certify that the foregoing on this page is a full, true and correct copy of the Court's Order, dated December 21, 1978, [sic] * overruling appellant's motion for rehearing in the foregoing entitled cause as the same now appears of record in Volume 17, at Page No. 139, of the Minutes of this Court.

IN WITNESS WHEREOF, I hereunto set my hand and affix the Seal of said Court at El Paso, this the 9th day of June, A.D. 1978.

ANNE D. RAY, CLERK

/s/ Martha S. Diaz, Deputy.

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*This is a typographical error. It should read "December 21, 1977."

APPENDIX D

NO. 8817

IN THE DISTRICT COURT OF
WINKLER COUNTY, TEXAS
109TH JUDICIAL DISTRICT

IN THE INTEREST OF
TIFFANY LYNETTE BUTTS,
A CHILD

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the request of Respondent in the above entitled and numbered cause, I hereby make the following as my Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

On either July 15, 1973, or July 17, 1973, Respondent left her child, Tiffany Lynette Butts, in the possession of Petitioners, who were not a parent of said child, without expressing an intent to return.

2.

At no time since Respondent left her child, Tiffany Lynette Butts, with Petitioners until the time of the trial of this cause, has such Respondent provided adequate support of said child, nor has she discussed the question of support with Petitioners.

3.

Respondent remained away from said child after voluntarily leaving such child in the possession of Petitioners on either July 15, 1973, or July 17, 1973, for a period in excess of three (3) months without providing adequate support for said child.

4.

Respondent has had adequate financial resources since leaving her child, Tiffany Lynette Butts, with Petitioners to contribute and provide for adequate support of said child.

5.

Respondent has had substantially the same financial resources available to her to contribute or to provide for the adequate support of her child, Tiffany Lynette Butts, at all times since August, 1974, that she had at the time of the trial of this cause.

6.

The minor child, Tiffany Lynette Butts, has expressed to the Trial Court in an en camera examination and the Trial Court finds that to return the child to Respondent's custody to be reared on an Indian Reservation would be detrimental and endanger the physical and emotional well-being of said child.

7.

The child has physical features, as observed by the Trial Court, of a non-Indian nature and her return to an environment consisting of primarily Indian people would subject her to being reared under unnatural conditions that would be detrimental and endanger her emotional wellbeing.

8.

Respondent has had all the available legal assistance, that she now has, at all times for the more than three

years that the child has been with the Petitioners to seek a return but the Respondent failed to do so until this suit was initiated.

CONCLUSIONS OF LAW

1.

Respondent knowingly left her minor child, Tiffany Lynette Butts, in the possession of Petitioners on either July 15, 1973, or July 17, 1973, without expressing an intent to return.

2.

Respondent left her minor child, Tiffany Lynette Butts, in the possession of Petitioners without providing for adequate support for said child.

3.

Respondent left her minor child, Tiffany Lynette Butts, in the possession of Petitioners, and remained away for a period of at least three (3) months.

4.

Respondent failed to support her minor child, Tiffany Lynette Butts, in accordance with her ability during a period of one year ending within six (6) months of the date of the filing of Petitioners' Petition.

5.

The termination of the parental rights between Respondent and her minor child, Tiffany Lynette Butts, is in the best interest of said child.

SIGNED AND RENDERED this 22d day of February, A.D. 1977.

/s/ Ken G. Spencer
Ken G. Spencer,
Judge Presiding

NO. 8817

IN THE DISTRICT COURT OF
WINKLER COUNTY, TEXAS
109TH JUDICIAL DISTRICT

IN THE INTEREST OF
TIFFANY LYNETTE BUTTS,
A CHILD

DECREE OF TERMINATION

On the 8th day of November, 1976, trial on the merits was held in this cause.

Petitioners, Bernard C. Butts, Sr., and wife, Ila Marie Butts, who reside at 527 N. Avenue C., Kermit, Winkler County, Texas, appeared in person and by attorney, John R. Lee.

Respondent Mother, Bernadine Ross [sic] Brokenleg, who resides on the Rose Bud [sic] Sioux Reservation near Parmelee, South Dakota, appeared in person and by her attorney, Bertram E. Hirsch.

Also appearing was Michael L. Fostel, P. O. Box 1015, Kermit, Texas, appointed by the Court as Guardian ad Litem of the child.

Respondent Father, Bernard C. Butts, Jr., did not appear, having theretofore [sic] duly and properly filed his unrevoked and irrevocable Affidavit of Relinquishment of Parental Rights as provided in Section 15.03, Texas Family Code.

The Court, after examining the pleadings, listening to the evidence and argument of counsel, finds that it has jurisdiction of this cause and the parties. It finds that no other Court has continuing exclusive jurisdiction of this cause at this time.

No jury was demanded, and all matters in controversy, including questions of fact and law, were submitted to the Court. All persons entitled to citation were properly cited.

The Court finds that Petitioners have requested termination of the parent-child relationship between Respondent Mother, Berandine Ross [sic] Brokenleg and Respondent Father, Bernard C. Butts, Jr.

The Court finds that the mother of the child has:

(1) voluntarily left the child alone or in the possession of another, not the parent, without expressing an intent to return;

(2) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child and remained away for a period of at least three months;

(3) failed to support the child in accordance with her ability during a period of one year ending within six months of the date of the filing of this petition;

The Court further finds that:

Respondent Father executed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided in Section 15.03, Texas Family Code.

The Court finds that termination would be in the best interest of the child.

IT IS THEREFORE ORDERED AND DECREED that the parent-child relationship between Respondent Mother, Bernadine Ross [sic] Brokenleg and Respondent Father, Bernard C. Butts, Jr., and the child, Tiffany Lynette Butts, be and is hereby terminated.

The Court further finds that the best interest of the child will be served by appointing Bernard C. Butts, Sr., and wife, Ila Marie Butts, as Managing Conservators.

IT IS THEREFORE ORDERED AND DECREED THAT Bernard C. Butts, Sr., and wife, Ila Marie Butts, be and are hereby appointed Managing Conservators of the child.

SIGNED AND ENTERED this 2nd day of December, 1976.

/s/ Ken G. Spencer,
Ken G. Spencer,
Judge Presiding

Supreme Court, U. S.
FILED
OCT 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-25

BERNADINE ROSE BROKENLEG,

Petitioner,

v.

BERNARD C. BUTTS, SR., *et ux.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS OF
THE STATE OF TEXAS, EL PASO, TEXAS

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Petitioner, Bernadine Rose Brokenleg, respectfully submits this Supplemental Brief in order to call the Court's attention to new legislation.

On October 14, 1978, the Congress enacted S. 1214, the Indian Child Welfare Act of 1978. The President is expected to sign S. 1214 into law on or about November 1, 1978.[1] Under the provisions of S. 1214, the courts

[1] The legislative history of S. 9214 includes: H.R. Rept. No. 95-1386, 95th Cong., 2d Sess. (1978); S. Rept. No. 95-597, 95th Cong., 1st Sess. (1977); Indian Child Welfare Act of 1977, Hearing

[footnote continued]

below would not have been able to render their respective decisions. Section 101 of S. 1214 would divest state courts of jurisdiction in termination of parental rights and conservatorsship proceedings involving Indian children like Tiffany.[2] And, in the event that state courts retain jurisdiction over such proceedings, Section 102 of S. 1214 requires that (1) the placement of a child with a conservator must be based on "clear and convincing evidence . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child,"[3] and (2) termination of parental rights must be based on "evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child."[4]

Before the Select Committee on Indian Affairs, United States Senate, 95th Cong., 1st Sess. (1977); Task Force Four Report on Federal, State and Tribal Jurisdiction, Report to the American Indian Policy Review Commission, 94th Cong., 2d Sess. (1976); and Indian Child Welfare Program, Oversight Hearing Before the Subcommittee on Indian Affairs, United States Senate, 93d Cong., 2d Sess. (1974).

[2]Section 110 of S. 1214 divests courts of jurisdiction where the petitioner in a termination of parental rights or conservatorship proceeding involving an Indian child has improperly obtained the custody of an Indian child. This Section would become applicable to cases such as the one at bar.

[3]The evidence is that Tiffany was well cared for while in Petitioner's custody both on and off the Rosebud Sioux Indian Reservation. There is no evidence that Tiffany suffered physical or emotional damage of any kind at any time while in Petitioner's custody. Tiffany's current excellent physical and emotional health supports this evidence.

[4]The Section 102 termination of parental rights beyond a reasonable doubt standard could become applicable to Texas appointments of non-parent managing conservators. Under V.T.C.A. § 14.08, the appointment of a managing conservator can

[footnote continued]

Petitioner respectfully prays that this Court grant a writ of certiorari to the Court of Civil Appeals, El Paso, Texas.

Respectfully submitted,

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result in denying a parent access to a child. This result differs little from a *de jure* termination of parental rights. Thus, the Court of Civil Appeals decision may, in effect, terminate Petitioner's parental rights.

Supreme Court, U. S.
FILED
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SUPPLEMENT TO SUPPLEMENTAL BRIEF OF PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI
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THE STATE OF TEXAS, EL PASO, TEXAS

SUPPLEMENT TO SUPPLEMENTAL BRIEF OF PETITIONER

Petitioner, Bernadine Rose Brokenleg, respectfully submits this Supplement to her Supplemental Brief.

On November 8, 1978, President Jimmy Carter signed into law the Indian Child Welfare Act of 1978, P.L. 95-608, 92 Stat. 3069. Additional legislative history of the Act can be found in the Congressional Record for

October 14, 1978 at pages H. 12848 to H. 12857 and at pages S. 19029 to S. 19032.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

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No. 78-25

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versus

BERNARD C. BUTTS, SR., ET UX,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE EL PASO COURT OF CIVIL APPEALS
FOR THE STATE OF TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-25

BERNADINE ROSE BROKENLEG,
Petitioner,

versus

BERNARD C. BUTTS, SR., ET UX,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE EL PASO COURT OF CIVIL APPEALS
FOR THE STATE OF TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent submits this brief in opposition to the Petition for Writ of Certiorari filed herein by the Petitioner.

OPINIONS BELOW

The order of the Texas Supreme Court (Appendix B of Petition) refusing Petitioner's application for writ of error is unreported. The opinion of the El Paso Court of Civil Appeals (Appendix C of Petition) is reported

at 559 S.W.2d 853 (1977). The judgment of the 109th Judicial District Court of the State of Texas (Appendix D of Petition) is unreported.

JURISDICTION

Petitioner seeks to invoke jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I.

WHETHER THE LOWER COURT ERRED CONSTITUTIONALLY BY USING THE 'BEST INTERESTS' TEST IN RESOLVING THE INSTANT CUSTODY DISPUTE.

II.

WHETHER THE LOWER COURT COMMITTED CONSTITUTIONAL ERROR BY REFERRING TO THE ENVIRONMENT OF AN INDIAN RESERVATION IN DETERMINING THE APPROPRIATE CUSTODIAN FOR THE CHILD.

III.

WHETHER THE LOWER COURT CONSTITUTIONALLY ERRED BY DETERMINING THE APPROPRIATE FAMILIAL CUSTODIAN OF A CHILD UPON A PREPONDERANCE OF THE EVIDENCE.

STATEMENT OF THE CASE

Bernard C. Butts, Sr. and his wife, Ila Marie Butts, Respondents, are the paternal grandparents of Tiffany Lynette Butts. On or about July 15, 1973, Petitioner Bernadine Rose Brokenleg, Tiffany's mother, relinquished custody of Tiffany to the Butts during their visit to the Reservation. (Statement of Facts pages 6-7, 25-27, 39-41, 71). Although testimony at trial conflicted over the intended length and purpose of this relinquishment, the Trial Court found that Ms. Brokenleg evidenced no intent of regaining custody of Tiffany. (Finding of Fact No. 1). The Trial Court further found that until the institution of the present suit, Petitioner failed to seek the return of Tiffany. (Finding of Fact No. 8). Thus, for a period of three years, Respondents had full custody, control and responsibility for Tiffany's upbringing.

Upon hearing this case, the Trial Court was presented evidence relating to (1) the quality of Tiffany's life while with Petitioner, (Statement of Facts pages 20, 32, 38-39, 45, 90-92, 131, 133); (2) the potential dangers facing Tiffany due to the civil conflicts on the Reservation, (Statement of Facts pages 7, 46-47); (3) Petitioner's contacts with Tiffany at the time of and subsequent to her departure, (Statement of Facts pages 30-31, 39-40, 48-49, 53-54, 56-58); (4) the quality of Tiffany's life while with Respondents, (Statement of Facts pages 11-13, 43-46); and (5) Tiffany's desire to remain with Respondents, coupled with her desire not to return with Petitioner to the Reservation, (Statement of Facts pages 127-137) (See Appendix).

Upon hearing the evidence, the Trial Court found, as fact, that Petitioner Brokenleg had (1) left her child, without expressing an intent to return; (2) failed to provide adequate support for Tiffany; and (3) remained away from Tiffany for more than 3 months, without providing support. Further, the court found, as fact, that Petitioner had adequate financial resources to contribute to the support of her child. The Court also found, as fact, that to return Tiffany to her mother's custody, to be raised by her on the Reservation, would be detrimental both physically and emotionally. Accordingly, the Court terminated Petitioner's parental relationship with Tiffany. The Court also decided that Tiffany's best interests would be served by appointing Respondents as her Managing Conservators.

On appeal, the El Paso Court of Civil Appeals reversed the decree of termination, but affirmed Respondent's appointment as Managing Conservators. In so doing, the Court of Civil Appeals held that Petitioner had satisfied the legal requirement of providing for Tiffany by placing her in the custody of her grandparents. The Court further declared that the termination of Petitioner's relationship was not in Tiffany's best interest. In overruling the trial court's conclusions of law, however, the Court of Civil Appeals did not reject the trial court's findings of facts. Rather, the Court of Civil Appeals amplified on the trial court's findings in declaring that Tiffany's desires, coupled with the more stable atmosphere of Respondent's home justified the custodial award. In fact, the Court of Civil Appeals concluded "that all of the factors listed so bearing on the best interest of the

child in the *Holley* case support the trial court's conclusion that custody should be awarded to the grandparents in this case . . . ." In *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), The Texas Supreme Court identified nine factors to be considered in ascertaining whether termination is in the best interests of the child: "(A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interests of the child; (F) the plans for the child by these individuals . . .; (G) the stability of the home or the proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent." 544 S.W.2d 371-372.

In so holding, the court necessarily relied on each of the lower court's findings of fact. Even though these findings were insufficient to establish a statutory termination, the abandonment and lack of support were relevant to the custody award. In light of all these factors, the Court of Civil Appeals found that Tiffany's interests would be best served by remaining with Respondents.

The Texas Supreme Court, on April 5, 1978, refused Petitioner's Application for a Writ of Error, finding no reversible error in the judgment and opinion of the Court of Civil Appeals.

ARGUMENT

I.

The Lower Courts Did Not Constitutionally Err By Using The 'Best Interests' Test In Resolving The Instant Custody Dispute.

The Texas District Court, after an individualized hearing, granted Respondents custody of Tiffany. In so doing, the lower court found that it would be in Tiffany's best interests to remain with her grandparents. This process, and hearing, afforded Petitioner her full constitutional rights as established by *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Quilloin v. Walcott*, ___ U.S. ___, 54 L.Ed.2d 511 (1978).

Petitioner claims that *Stanley* created a constitutional right to a determination of a parent's unfitness prior to the removal of her children from custody. A cursory reading of *Stanley* establishes that this Court did not intend to create a constitutional requirement of unfitness as a prerequisite to a loss of custody.

In *Stanley*, this Court was confronted with a statute that required the State to show a wed father's unfitness prior to the termination of his parental rights, but conclusively presumed an unwed father to be an unfit parent. In invalidating this statute, this Court focused its displeasure on the "procedure by presumption", 405 U.S. at 656, and not on the requisite level of parental misconduct. In reaching this decision, the Court looked to *Bell v. Burson*, 402 U.S. 535 (1971), which held "that the State could not, while purporting to be concerned with fault in suspending a driver's license, deprive a citizen of his license without a hearing that would assess fault." 405 U.S. at 657. Analogously, it would be appropriate to summarize *Stanley* as holding that "the State could not, while purporting to be concerned with [fitness in determining parental rights], deprive a citizen of his [parental rights] without a hearing that would assess [fitness]." Yet, it would be error to conclude on the basis of either *Bell* or *Stanley* that the constitution required either a finding of fault prior to the suspension of a driver's license, or a finding of unfitness prior to the granting of custodial rights to nonparents. These cases require only that there be an individualized hearing prior to the determination. *See United States Department of Agriculture v. Murry*, 413 U.S. 508, 518 (1973) (Marshall, concurring). In the instant situation, there was such an individualized hearing as to satisfy the Due Process Requirement established in *Stanley*.

Furthermore, in *Quilloin v. Walcott*, ___ U.S. ___, 54 L.Ed.2d 511 (1978), this Court explicitly approved the use of the 'best interests' test in cases where both litigants are relatives of the child. There is no basis for limiting this approach to the 'nuclear' family. The tradition of grandparents raising children, in necessary cases, is equally venerable and equally deserving of constitutional recognition. *Accord, Moore v. City of East Cleveland*, 431 U.S. 494 (1977). In the instant situation, as in *Quilloin*, the challenge comes from a parent who has not, since 1973, exercised actual or legal custody over the child. Nor has Petitioner, since 1973, shouldered any significant responsibility with regard to Tiffany's daily super-

vision, education, protection or care. Furthermore, Tiffany has expressed an unequivocal desire to stay with Respondents. (Statement of Facts, pages 133-134). Finally, the District Court's decision places Tiffany with the same set of legal custodians with whom she has lived since 1973. In light of all these circumstances, *Quilloin* controls the instant case, and it cannot be said, "that the State was required in this situation to find anything more than that the [custody award] was in the 'best interests of the child.' " ___ U.S. ___, 54 L.Ed.2d at 520.

II.

The Lower Courts Committed No Constitutional Error By Referring To The Environment Of An Indian Reservation In Determining The Appropriate Custodian For The Child.

A. *The findings of fact were not based on racial considerations.*

A full consideration of the Statement of Facts makes it clear that District Judge was primarily interested in Tiffany's well being, rather than her status, or that of Petitioner, as an enrolled tribal Indian. In making Findings of Fact in this case, the District Judge found that (1) Petitioner had left Tiffany, without evidencing an intent to return, (2) that Petitioner had not provided adequate support for Tiffany, (3) that Petitioner has stayed away from Tiffany for more than three months, and (4) that Petitioner had always had adequate financial resources to contribute to the support of Tiffany. In these findings of fact, Petitioner

could find no racial reference; indeed, she could find but a mere description of he own actions. Nor could Petitioner find a racial refere ce in the Court of Civil Appeals' decision on custody. None of these findings of fact were overruled by the El Paso Court of Civil Appeals. The appellate court merely ruled that these facts did not justify a termination of parental rights under the appropriate statutory provisions. 559 S.W.2d at 856. The difficulty of a custody determination "lies in part in the fact that most of the factors listed have some equal application to both the issue of custody and the issue of termination." 559 S.W.2d at 857. The Court of Civil Appeals explicitly mentioned that (1) Tiffany's desires (2) the stability of the home and (3) all other factors bearing on Tiffany's best interests supported the custody award.

Rather, Petitioner relies on the District Court's use of the words 'Indian' and 'Indian Reservation' to claim that improper racial considerations entered into the decision. A review of the two challenged findings of fact demonstrate the weakness of Petitioner's position.

Finding of Fact No. 6 declares that Tiffany had expressed to the Trial Court that to "return the child to Respondent's custody to be reared on an Indian Reservation would be detrimental and endanger the physical and emotional well-being of said child". Indeed, Tiffany made the first mention of the Reservation in her testimony before the Judge, declared her dislike for it, and expressed a desire not to be with her mother. (Statement of Facts pages 129-133). In adopting Tiffany's own express distaste for life on the

Reservation, the trial judge cannot be deemed to have made a discriminatory racial classification. This finding of fact was appropriately based on the testimony of the child involved in the hearing, and not a preconceived notion of racial characteristics.

Finding of Fact 7 declares that since Tiffany has non-Indian physical features, "her return to an environment consisting of primarily Indian people would subject her to being reared under unnatural conditions that would be detrimental and endanger her emotional well being." This finding must be read in light of the evidence adduced at trial of the civil conflicts arising on and around the Reservation. (Statement of Facts pages 7, 46-47). It might be inferred that the civil conflicts were racially divisive. In light of these conflicts, Tiffany's safety would be best protected by her remaining with Respondents. A Finding of Fact dealing with her physical safety, although expressed inartfully, should not give rise to the claim that irrelevant racial considerations entered into the trial court's decision.

B. *If racial considerations were present, the Trial Court handled them constitutionally.*

This Court has recently held that in areas of fundamental rights, such as voting and education, there is no *per se* rule against a nondiscriminatory consideration of race. *Regents of the University of California v. Bakke*, ___ U.S. ___, 98 S. Ct. 2733 (1978); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977). As long as race is not used to automatically exclude an individual from educational

opportunities, the State universities "may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate education purpose." *Bakke*, 98 S. Ct. at 2763 n. 53 (Powell). Nor is the "permissible use of racial criteria . . . confined to eliminating the effects of past discriminat[ion]." *United Jewish Organization*, 430 U.S. at 161 (plurality opinion). Rather, the permissible use of racial considerations in individualized hearings seems to extend so far as is necessary to effectuate a permissible state goal.

In the instant case, race, if it was considered at all, was considered only to determine the emotional and physical well-being of Tiffany. Such a use of race in adoption proceedings has generally been upheld, so long as race itself is not the determinative factor. *Drummond v. Fulton County Department of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977) (en banc), *cert. denied*, 98 S. Ct. 3103 (1978); *In Re Adoption of a Minor*, 97 U.S. App. 99, 228 F.2d 446 (1955); *Compos v. McKeithen*, 341 F. Supp. 264, 267 (E. D. La. 1973). When racial considerations arise due to their relevancy to the particular dispute, there is no constitutional violation so long as they are but one of the many factors taken into consideration. *Bakke*, 98 S. Ct. at 2763. (Powell). Thus, Ms. Brokenleg's "qualifications . . . have been weighed fairly and competitively, and [s]he [has] no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.*

In the instant case, the only mention of racial considerations was in the context of (1) Tiffany's desires and (2) the environment most suitable for Tiffany to be

raised in. Since these references were not made in such a manner as to automatically exclude the consideration of Petitioner as Tiffany's custodian, or stigmatize Petitioner, there has been no infringement on Petitioner's Fourteenth Amendment rights.

Further, this Court has consistently held that "Proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977). *See also Washington v. Davis*, 426 U.S. 229 (1976). In the instant case, there has been, and there can be, no showing of such discriminatory intent. The lower courts were faced with the awesome responsibility of deciding which familial unit would fulfill Tiffany's best interests. In determining this issue, the courts considered all relevant criteria. There was no decision based solely on race. Rather, the decision was based on the totality of the circumstances, perhaps including the ethnic environment most appropriate for Tiffany. As in the adoption cases, this was not a constitutionally impermissible consideration in the context of the instant individualized proceedings.

C. *The lower courts had sufficient grounds other than those challenged by Petitioner to support the custody award.*

The District Court found, as fact, that Petitioner had left her child, afforded no contribution to her support, and had failed for over three years to seek her return. The Court of Civil Appeals amplified these findings of fact, and found that all of the factors (including Tiffany's wishes and the stability of Respondents' home) bearing on the best interests of Tiffany supported the custody award to Respondents. In light of these explicit findings of fact, it is readily ascertainable that the lower courts would have awarded Respondents custody of Tiffany, even if Findings No. 6 and 7 were never considered. There is no evidence that the absence of these two Findings would have affected the custodial award.

In this situation, this Court has declared that the mere consideration of improper factors is insufficient to require a reversal of the resulting decision. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Rather, if "the same decision would have resulted even had the impermissible purpose not been considered . . . the complaining party . . . no longer could fairly attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 270-71, n. 21 (1977).

In the instant case, not only would the custodial decision be the same absent consideration of Findings in its opinion. There is no evidence to warrant upheld absent consideration of those Findings. The Court of Civil Appeals never referred to those Findings in its opinion. TThere is no evidence to warrant any argument that the Court of Civil Appeals even looked to those challenged Findings. Rather, the Court of Civil Appeals based its decision solely on (1) Tif-

fany's wishes, (2) the relative stability of the homes, and (3) the other factors relevant to a custody award. Thus, there is no basis for the argument that either Finding No. 6 or Finding No. 7, if impermissibly considered, contributed materially to the custody award. *Village of Arlington Heights*, 429 U.S. at 270-71 n. 21. Accordingly, the lower courts' custodial award is in full accordance with the applicable decisions of this Court.

III.

The Lower Courts Did Not Constitutionally Err By Determining The Appropriate Familial Custodian Of A Child Upon A Preponderance Of The Evidence.

In determining that Respondents should have custody of Tiffany, the courts below based their decision upon a preponderance of the evidence. Petitioner contends that the utilization of this standard was constitutionally impermissible. However, each of these cases upon which Petitioner relies is readily distinguishable from the instant case. Those cases fail to support Petitioner's position that interfamilial custodial disputes should be decided upon a standard of evidence more strict than that which has historically served as a guide for the resolution of civil disputes.

In Re Winship, 397 U.S. 358 (1970), confronted this Court with the "narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an

adult." 397 U.S. at 359. In deciding that a juvenile should have that protection, this Court focused on the stigma that would potentially follow an adjudication of guilt in a juvenile proceeding. The Court was also concerned with the juvenile's potential loss of liberty due to 'temporary' incarceration. It was only in light of this potential stigmatization and incarceration of the juvenile that the Court insisted upon such a high standard of proof.

Similarly, it was the Court's concern with "the drastic deprivations that may follow" a deportation proceeding that led this Court to insist upon a 'clear and convincing' standard of proof in *Woodby v. INS*, 385 U.S. 276, 285 (1966). The Court focused on the government's power to physically remove a resident from this country, uprooting him from his past and placing him in an unknown situation, as proof of the necessity of a "higher degree of proof than applies in a negligence case." 385 U.S. at 285.

Each of the other cases that Petitioner cites in relation to her argument deals with the unique situation of a State's attempt to deny an individual certain benefits, or certain rights. In both *Sims v. State Department of Public Welfare*, 438 F. Supp. 1179 (S. D. Tex. 1977), and *Alsager v. District Court*, 406 F. Supp. 10, 25 (S. D. Iowa 1975), *aff'd on other grounds*, 545 F.2d 1137 (8th Cir. 1976), the government attempted to break up the family unit, contrary to the wishes of the parents *and* the children. In both cases, the District Courts held that State, as movant, could not interfere with the integrity of the family unit, unless it was acting upon 'clear and convincing' evidence.

Accordingly, in order for the higher standards of proof to be applicable, Petitioner would need to show that either stigma, incarceration or a state deprivation of a fundamental right would result from the instant litigation. Absent the presence of one of these considerations, it would be an unprecedented step for the Court to require more than a preponderance of the evidence.

In the instant case, the movant was not the State; rather the parties requesting custody were Tiffany's paternal grandparents. Further, they requested custody only after three years of the sole responsibility for her growth. There was no likelihood that Tiffany, as a result of this litigation, would suffer either an incarceration or stigmatization. Rather, this litigation was to result in the legal determination of a home environment that would serve her best interests. This was not an attempt to dismember any family; rather, this was a search to discover the proper family unit. Guidance as to the appropriate unit was sought from all, including Tiffany. Where, as here, the State is called on to adjudicate the appropriate family unit, and not to advocate the break up of any family, the courts must be free of presumptions and standards of proof that preclude the full consideration of relevant criteria.

Petitioner has cited to no cases evidencing that an interfamilial custody dispute should be decided on more than a preponderance of the evidence. Where there is no possibility of incarceration, or stigmatization, the appropriate standard is the preponderance of the evidence. The lower courts conflicted with no applicable decisions in so holding.

CONCLUSION

It is therefore respectfully submitted that the lower courts conflicted with no applicable decisions of this Court in making the custody award. Accordingly, this case is not a proper one for review by certiorari in the Supreme Court of the United States, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN R. LEE
P. O. Box 766
Kermit, Texas 79745

_____

JOHN R. LEE

CERTIFICATE OF SERVICE

John R. Lee, Attorney for Respondent, certifies that on the ____day of September, 1978, he mailed three true and correct copies of Brief of Respondent to Petitioner's Petition for a Writ of Certiorari to the El Paso Court of Civil Appeals for the State of Texas to Bertram Hirsch, Attorney for Petitioner, 432 Park Avenue South, New York City, New York, 10016; Michael L. Fostel, Guardian Ad Litem, Box 1015, Kermit, Texas, 79745; and to Terry L. Pechota, Attorney for the Rosebud Sioux Tribe, P. O. Box 288, Mission, South Dakota, 57555, appearing Amicus Curiae.

_____

John R. Lee

APPENDIX

[127] TIFFANY LYNETTE BUTTS
being called as a witness by Judge Spencer, the oath was not given because of the tender age of the child, and the following questions and answers were adduced:

EXAMINATION

By Judge Ken Spencer:

Q Tiffany, what is your full name? Can you tell me?

A Tiffany Lynette Butts.

Q How old are you?

A Six.

Q How long have you been going to school now? Two years?

A I think that's it.

Q You went to kindergarten last year and you're in the first grade this year?

A Yes.

Q Do you like school?

A Yes, I do.

Q Do you like your teacher?

A Yes.

Q Do you mind visiting with me?

A No.

Q I may sound like I'm groupy because I have a cold, but I'm really not. Do you know what it is to tell the truth, Tiffany?

A Yes.

[128] Q Do you know what happens to girls that don't tell the truth?

A No.

Q But, you do know the difference between telling the truth and telling a fib, don't you?

A Yes.

Q How long have you lived in Kermit?

A About four years or four months. I don't know which.

Q You were here last Christmas and the Christmas before that. Do you remember that?

A Yes.

Q Do you remember ever living any place else besides Kermit with somebody else?

A Uh-huh.

Q Who would that be?

A First it was just my mother and daddy and next it was just my mother.

Q Do you remember where that was? Was it at Long Beach?

A I don't know. I know it was real far away from here.

Q Does California sound familiar to you?

A That's the first place I lived.

Q You lived with your mother and daddy there?

A Yes.

Q And then your daddy left and you lived with your mama there?

A No.

Q How was it?

A Well, when I still was a baby, my mother took me and we went away [129] to the Reservation.

Q Do you remember that place?

A Yes.

Q Did you like it there?

A No, I didn't.

Q You were too young to go to school there, weren't you?

A Yes.

Q Did you live out in the country or in a little town?

A Out in the country.

Q You didn't have any little girls to play with out there?

A No.

Q Do you have little girls to play with here? Do you have friends now?

A Yes.

Q What are their names?

A Jeffery, Devonn, Carrie, Joe and all of them.

Q And who do you live with now?

A My grandma.

Q Do you live with your grandpa too?

A No.

Q Your grandpa doesn't live with you at your house?

A Sometimes he comes, but he don't stay there.

Q He doesn't stay there? Is he away on business?

A He lives in Odessa.

Q He lives in Odessa?

A Yes.

[130] Q That's your daddy, isn't it, that lives in Odessa?

A No. My daddy lives over here with us.

Q Your daddy lives with you and your grandma?

A Yes.

Q And your grandpa doesn't live with you? He just comes in and visits sometimes?

A Yes.

Q Does your grandma have a nice house for you?

A Yes, she does.

Q Do you have your own room?

A Yes.

Q Do you like it? Is it fixed up for little girls?

A Yes.

Q Do you remember your mama visiting you last Christmas?

A Yes, I do.

Q Have you got a cold like I have?

A Yes.

Q Goodness! Did you know I have a friend in Crane named Tiffany?

A No.

Q She is the daughter of a lawyer in Crane. You said you remembered your mother visiting you last Christmas. Did she stay with you at your house when she came to visit?

A Yes.

Q Did she play with you?

A No, but she talked to me. She wanted me to go back to the Reservation. [131] I didn't want to go because she took badly care of me up there.

Q Do you remember that?

A Yes. I remember everything.

Q You remember everything?

A Yes.

Q How do you mean she took badly care of you?

A Well, for one thing, we was going to walk to town. Mother put her hand on me, and she turned around, and she said she was going to leave me there. She drug me by the hair and ran and went to town. She left me there. I had to stay there and all that stuff. The dogs took a bath with me. That's the reason I had ticks and stuff.

Q You remember all that?

A Yes, and I remember a lot of other things too.

Q You remember things like what, Tiffany?

A Well, the time she locked me in the house and she tried to burn the house down with me in it.

Q She locked you in the house and tried to burn it with you in it?

A Yes.

Q Is that true or did you just imagine that?

A It's true. And then she unlocked it and came back in and then she didn't burn it down. She changed her mind, but she locked me in the house. Just stuff like that. There is a lot of other things that happened besides those two.

Q Did she ever talk about your daddy?

A No. He came there once on my birthday and had to leave because she [131] treated him just like she treated me.

Q How do you mean?

A Well, one time she scratched his coffee table, and she punched holes in one of his suits. She did a lot of other horrible things.

Q What did he do to make her so angry?

A He didn't do nothing mean to her. He didn't even try to beat her up or nothing. He didn't do nothing bad to her.

Q I wonder why she lost her temper. Do you remember living with your mother after your daddy left?

A My daddy was still there and my mama took me away.

Q Did you move in with some other people?

A No.

Q Is that when you went to the Reservation?

A Yes. There is something else I can remember about.

Q What was that?

A We was driving home a long time ago when mama didn't know how to drive a car and we had a wreck, but we were lucky.

Q You didn't get hurt?

A No.

Q Didn't mama get hurt and have to go to the hospital?

A Yes, I think so.

Q But, you were in the car with her when she had the accident?

A Yes.

Q Did it scare you?

A Yes.

[133] Q Where was that?

A We was almost home.

Q Was that up near the Reservation?

A That was on the Reservation.

Q Where did you take your bath when you took one?

A In a big bucket, and the dogs took a bath with me.

Q Every time?

A Yes.

Q Do you know what a dream is?

A Yes.

Q Do you have very many dreams?

A Yes.

Q Do you have all kinds of dreams?

A Yes.

Q Do you remember talking to a lady yesterday about a dream and drawing a picture for her?

A That was a nightmare.

Q You told the lady about the nightmare?

A Yes.

Q Did you just have the one nightmare, or have you had several?

A Not very many times.

Q Would you like to go visit with your mama and stay with her?

A No, I wouldn't.

Q You wouldn't like to be with her?

A No.

[134] Q You know that mamas are very rare people?

A Yes, but not my mama. She ain't.

Q Why wouldn't you like to stay with her?

A I just wouldn't.

Q Has she talked to you about staying with her and visiting with her?

A Yes.

Q When did she talk to you about that? Can you remember?

A Yesterday.

Q Was that the first time she has asked you to go with her?

A No, it isn't.

Q When she is away from you, does she ever call you on the telephone?

A Not very much.

Q Do you remember when you first came to Kermit to live with your Grandma?

A Yes, I do.

Q Did you come to Kermit with your Grandma and Grandpa after you went on a vacation?

A Yes, and my daddy and uncle.

Q Where did you go on your vacation?

A I went to a fruit stand and I forgot the name of it. Just two towns is all we went to, and then by night time, we were in Kermit.

Q And your mama came that Christmas to visit you, didn't she?

A Yes.

Q Did she talk to you about going home with her?

A Yes.

[135] Q Do you like staying here in Kermit?

A Yes, I do.

Q Why do you like to stay here?

A Because of my Grandma and my daddy and my uncle. They all take care of me.

Q Do they take good care of you?

A Yes.

Q Do they make you mind?

A They sure do.

Q But, little girls have to be made to mind sometimes, don't they?

A Yes.

Q And even big girls and little boys and big boys have to mind. Do you go to Sunday School?

A Yes, but I didn't go to Sunday School when I lived with my mother, and I had to fix my own breakfast too.

Q You sure were a little girl to be fixing your own breakfast, weren't you?

A Well, I was three years old.

Q What did you fix for your breakfast?

A Cereal, and that was about it. One time I forgot the sugar.

Q It didn't taste good, did it?

A No. One time I put a lot of sugar in the cereal and it was too sweet.

Q It's not very good if it doesn't have enough sugar, and it doesn't taste good if it has too much sugar, does it?

A No.

[136] Q Do you know what a smiley is in school?

A Our teacher puts a smiley on our papers and she puts a stamp and a sticker on it and then she puts it on the door so we get a smiley on our papers when we do good, but if we do bad on our papers, she gives us a "P" or a "U".

Q Do you ever get any smileys?

A Yes.

Q What does it look like. I just heard about it today, and I don't know what it looks like.

A If you do good, she gives you two "O's" and then she puts a smiley face on your paper and a nose and the "O's" are the eyes.

Q And if you get a smiley face, that's the best there is?

A Yes, and sometimes you get a "G". I like the "G" best because it is the best grade. Sometimes you get an "E" for excellent. That's the best.

Q Do you ever get a smiley face with an "E"?

A Yes.

Q A smiley face means the teacher smiles because she likes what you did. Is that it?

A Yes.

Q Well, I never did have a smiley on any of my papers. Isn't that sad?

A I don't know.

Q Do you think you would like to stay in Kermit?

A Yes.

Q Has anybody told you to say that you wanted to stay in Kermit?

[137] A Nobody ever told me to say anything. My grandmother just told me to tell the truth and I am.

Q Do you know what a witness is?

A Yes.

Q Tell me what a witness is.

A He goes up there and tells the truth about who did what and all that kind of stuff.

Q I think that's fine, and Tiffany, I'm real proud of getting to meet you, and I appreciate your coming in to visit with me. I hope we didn't make you uncomfortable or scare you in any way.

A You didn't.

Q What do you do after you get home from school?

A Play.

Q Are there girls in your neighborhood that you play with?

A Yes.

Q Well, we certainly thank you for coming in and visiting with us.

A Do I go now?

Q Yes, is your grandmother waiting for you out in the hall?

A I think so.

Q Yes, you may leave now, and I sure do thank you for coming in.

A Okay. Thank you.

END OF STATEMENT OF FACTS

Supreme Court, U. S.
FILED
OCT 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1978

No. 78-25

BERNADINE ROSE BROKENLEG,

Petitioner,

v.

BERNARD C. BUTTS, SR., *et ux.*,

Respondents.

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, EL PASO, TEXAS

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Petitioner, Bernadine Rose Brokenleg, respectfully submits this Reply in order to discuss facts[1] that Respondents have presented to this Court in a misleading way.

[1] Petitioner does not subscribe to any of Respondent's discussion of the law applicable to this appeal and relies on her petition with regard to argument on the law.

Facts which are a matter of record include:

1. Tiffany Lynette Butts, the child whose custody is the subject of this appeal, was born on November 25, 1969. Statement of Facts, page 63.

2. Tiffany resided with Petitioner on the Rosebud Sioux Indian Reservation from May, 1972 to July, 1973, when she was between two years and six months old and three years and eight months old. Statement of Facts, page 67; Pet. App., page 22a.

3. Respondents filed their petition to terminate Petitioner's parental rights on April 10, 1975 when Tiffany was five years and five months old.

4. Tiffany was almost seven years old at the time of trial when she was interviewed by the District Court.

5. Tiffany never made the statements attributed to her in the District Court's Finding of Fact 6. Resp. Br. App., pages 1a-10a.

6. Petitioner had legal custody and the right to physical custody of Tiffany until the entry of the Decree of Termination on December 2, 1976.

7. A psychiatrist was the only expert witness at trial. The doctor, after examining Petitioner and Tiffany, testified for Petitioner:

> In my opinion, Bernadine is a competent mother. She has been a competent mother in the past, which is evidenced by the fact that the child is doing well now . . . . I think Bernadine . . . would make . . . a competent mother for the future . . . . I am impressed with this woman's stability.

Statement of Facts, page 100.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IS CLEARLY BASED ON UNCONSTITUTIONAL CONSIDERATION OF RACIAL FACTORS.

On December 2, 1976, the District Court entered its Decree of Termination. The Decree purported to recite facts. These "facts" merely repeated, virtually verbatim, the language in V.T.C.A. Family Code § 15.02(1)(B) and (F). Petitioner requested findings of fact and conclusions of law in order to determine the actual basis for the District Court decree.

On February 22, 1977, the District Court entered Findings of Fact and Conclusions of Law. Except for Findings of Fact 6 and 7, the Findings of Fact essentially repeat the language of V.T.C.A. Family Code § 15.02 (1)(B) and (F). Thus, it is clear that Findings of Fact 6 and 7 form the primary basis of the District Court decision and were stated in order to elucidate the other findings. This conclusion is supported by the holding of the Court of Civil Appeals that no evidence substantiates the § 15.02(1)(B) and (F) findings of the District Court.[2]

A. Finding of Fact 6

Respondents argue that Finding of Fact 6 is based on a seven year old child's recollections of her life on the Rosebud Sioux Indian Reservation when she was between two and one-half and three years and eight months old. The age of the child renders the recollections suspect.

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[2]The trial record is so completely devoid of evidence to support the District Court decree that the decree must be based on extra-evidentiary considerations. No evidence was adduced in support of Findings of Fact 6 and 7.

See attached Appendix A. And, Tiffany never expressed to the District Court either the words or the substance of Finding of Fact 6.[3] The Finding expresses the views of the District Court, not those of the child. See attached Appendix A.

B. Finding of Fact 7

Respondents argue that Finding of Fact 7 is premised on protecting Tiffany's physical well-being from civil conflict on the reservation. The argument falsifies the evidence.

Respondent's petition to terminate Petitioner's parental rights alleged that Petitioner engaged in conduct that endangered Tiffany's physical well-being under V.T.C.A. Family Code §15.02(1)(E). To support the allegation, Respondents asserted that Tiffany's Rosebud Sioux

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[3] Respondents' characterization of the "desires of the child" is put in focus by the psychiatric testimony offered at trial on behalf of Petitioner:

> I feel there has been a primary bond between Tiffany and Bernadine in the past which has been successful, and it needs to be established at this critical period of the child's life. In my opinion, the child is in a normal growth phase which is the first identification of herself as a young woman. She needs her mother's input into this emotional growth affair . . . . I feel . . . Tiffany is confused about the people in her world.
>
> . . . . [If Tiffany is not returned to her mother's custody], I would feel this would have a lifelong detrimental effect on the future development of Tiffany. I feel she would have a great deal of rejection to deal with. I think she would have a great deal of cultural issues to deal with. I think she would have a great deal of difficulty in trust . . . . I think Tiffany would [have an inability to love and feel close to people] if she continues to be apart from her mother. Statement of Facts, pages 102-104.

Indian Reservation home was in close proximity to Wounded Knee, South Dakota, a scene of civil conflict. Statement of Facts, page 101. The evidence revealed that (1) Wounded Knee is 130 miles from Petitioner's home, (2) Wounded Knee is not on the Rosebud Sioux Indian Reservation, and (3) no civil conflict occurred on the Rosebud Sioux Indian Reservation during the time Tiffany resided there. Statement of Facts, pages 120-121. In fact the civil conflict at Wounded Knee had ended by the time of Tiffany's residence on the Rosebud Sioux Indian Reservation. The District Court made no findings of fact or conclusions of law under §15.02(1)(E). Finding of Fact 7 has no relationship to civil conflicts that posed a threat to Tiffany's physical safety. The Finding is concerned only with racial factors which allegedly threaten Tiffany's well-being.

Finally, Respondents read the mind of the District Court and conclude that, absent the unconstitutional racial considerations in Findings of Fact 6 and 7, the District Court would not alter its custody award. Petitioner can equally speculate that absent such considerations due process would produce a different custody judgment.[4] Petitioner, and other fit parents, consistent

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[4] *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (CA8 1976), states the applicable due process standard: ". . . to preserve the best interests of both parents and children. . . termination [of the parent-child relationship] must only occur where more harm is likely to befall the child by staying with his parents than by being permanently separated from them." 406 F. Supp. at 24, aff'd, 545 F.2d at 1137. *Accord, Roe v. Conn*, 417 F. Supp. 769, 777 (M.D. Ala. 1976). *Alsager* and *Roe* support the proposition that the "threshold of harm" rule is the applicable due process standard in determining parental custody, as well as, permanent termination of the parent-child relationship. There is no evidence and the Court of Civil Appeals did not adopt any of

[footnote continued]

with due process, cannot be denied their fundamental right to the custody of their children based on speculation about what a court would decide if it applied constitutional rather than unconstitutional standards in making a custody award.[5]

CONCLUSION

It would be unprecedented and repugnant to the Fourteenth Amendment to conclude, as Respondents have, that racial considerations are appropriate in determining the custody of a child as between a parent and a non-parent.[6] Such a conclusion would threaten the integrity of the many families in the United States where parents and children have different complexions from one another or from the majority population in their community of residence. Respondents are, in effect,

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the District Court findings that Tiffany will suffer any harm if she is placed in Petitioner's custody. The undisputed evidence, offered by the psychiatrist, is that Tiffany is likely to suffer harm if she is not returned to Petitioner's custody and that Tiffany will benefit from being in Petitioner's custody.

The Court of Civil Appeals below did not strictly scrutinize the evidence generally or under the "threshold of harm" rule. Rather, it preferred to deny an admittedly fit parent the custody of her child under a "stability of the home comparison" test that is unsupported in law as an applicable due process standard in custody cases involving fit parents.

[5] Respondents have been appointed managing conservators of Tiffany. The appointment does not give Respondents permanent custody of Tiffany. Their appointment is subject to continuing court supervision and review. But See Pet., n. 13.

[6] Petitioner agrees with Respondents that racial considerations may be appropriate in determining a suitable adoptive home for a child.

asking this Court to approve the maintenance of racial purity and segregation repudiated by this Court and our Nation.

Since 1973, Respondents have prevented Petitioner from reobtaining the custody of her child. Again, petitioner respectfully urges this Court to issue a writ of certiorari to the Court of Civil Appeals of Texas, El Paso and to reverse the custody decision of that Court and the District Court.

Respectfully submitted,

BERTRAM E. HIRSCH
ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.
432 Park Avenue South
New York, New York 10016
Attorney for Petitioner

APPENDIX

APPENDIX A

STATE OF TEXAS)
) ss.:
COUNTY OF DALLAS)

Johanna Clevenger, being first duly sworn deposes and says:

1. I am the psychiatrist who examined Tiffany Lynette Butts on November 8, 1976 and who testified the same day before the District Court in In the Interest of Tiffany Lynette Butts, Cause No. 8817, held to determine whether to terminate the parent-child relationship between Tiffany and Bernadine Brokenleg.

2. I have read pages 127-137 of the Statement of Facts of the proceedings before the District Court, in the aforementioned proceedings. These pages are a transcription of an interview with Tiffany Lynette Butts conducted by District Court Judge Ken G. Spencer.

3. Based on my examination of Tiffany and on common knowledge in the field of psychiatry, Tiffany, at age seven, is not at an age of reason. She is at a stage of growth and development characterized by the use of fantasy and fairy stories which help her to understand the world around her, and to explain psychological issues encountered as she grows.

4. The most important psychological issue for Tiffany is the issue of separation from her mother. Tiffany's perception is that her mother abandoned her. The events that she purports to recall of her experiences on the Rosebud Sioux Reservation are in all probability not facts. These events are made up to express Tiffany's present feelings and to help her explain why she is not living with her mother.

5. The "fairy story" events that Tiffany has made up show that her mother was bad and this is Tiffany's explanation for her separation from her mother. This explanation could have catastrophic consequences for Tiffany during adolescence when the potential is great that she will believe that she has the same bad characteristics of her mother. It is crucial that Tiffany and her mother have an opportunity to revive their parent-child relationship.

6. The examination of Tiffany by the District Court provides more of a basis to study the ideas of the District Court regarding a six or seven year old child than it does for an assessment of Tiffany. The only valid "questioning" of Tiffany, to obtain information necessary to a properly reasoned evaluation of her thoughts and feelings, would occur in a playroom setting in which she would have an opportunity to unfold her story in play, in fantasy.

/s/ Johanna Clevenger, M.D.

Subscribed and sworn to
before me this 3rd day of
May, 1977.

/s/ Anna K. Porter
Notary Public

MOTION FILED
MAR 8 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-25

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Petitioner,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, EL PASO

MOTION FOR LEAVE TO PROCEED *AMICI CURIAE* BY THE NATIONAL INDIAN YOUTH COUNCIL., INC., CROW TRIBE OF INDIANS OF MONTANA, ONEIDA NATION OF NEW YORK AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

(additional Amici appear inside)

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ADDITIONAL AMICI

SISSETON-WAHPETON SIOUX TRIBE OF
NORTH DAKOTA AND SOUTH DAKOTA

WISCONSIN POTAWATOMIES OF THE
HANNAHVILLE INDIAN COMMUNITY OF MICHIGAN

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA

ASSOCIATION OF
VILLAGE COUNCIL PRESIDENTS (YUPIK ESKIMOS)

KODIAK AREA NATIVE ASSOCIATION (ALEUT)

TANANA CHIEFS CONFERENCE (ATHABASCAN)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-25

BERNADINE ROSE BROKENLEG,

Petitioner,

v.

BERNARD C. BUTTS, SR., *et ux.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, EL PASO

MOTION FOR LEAVE TO PROCEED *AMICI CURIAE* BY THE NATIONAL INDIAN YOUTH COUNCIL., INC., CROW TRIBE OF INDIANS OF MONTANA, ONEIDA NATION OF NEW YORK AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

(additional Amici appear inside)

MOTION

Ellen W. Leitzer, attorney for *amici curiae*, National Indian Youth Council, Inc., Crow Tribe of Indians of Montana, Oneida Nation of New York, Sisseton-Wahpeton Sioux Tribe of North Dakota and South Dakota, Wisconsin Potawatomies of the Hannahville Indian Community of Michigan, White Mountain Apache Tribe of Arizona, Association of Village Council Presidents (Yupik Eskimos), Kodiak Area Native Association (Aleut), Tan-

ana Chiefs Conference (Athabascan), hereby respectfully moves for leave to file the attached brief *amici curiae* in support of the Petition for Writ of Certiorari to the Court of Civil Appeals of the State of Texas, El Paso, in the above captioned action. Counsel for Petitioner has consented to the filing of this brief.* Counsel for Respondents has refused consent.

Amici contend, *inter alia,* that the Texas courts below lacked subject matter jurisdiction to either terminate the parent-child relationship or to appoint a conservator in this case. See Argument I, *infra.* Neither party to this litigation has raised this jurisdictional issue at any stage of the proceedings. It is crucial that this Court resolve the underlying jurisdictional question raised by *amici* prior to resolving other procedural and substantive issues raised by the parties herein. The interest of *amici curiae* in this proceeding is more specifically set out below.

INTEREST OF *AMICI CURIAE*

The National Indian Youth Council, Inc. (NIYC), is a national non-profit organization established in 1961. Among its objectives is to foster and promote nationwide interest and concern for the problems of American Indians to the end that racial tensions, prejudice and discrimination, economic and otherwise, may be eliminated and the valuable cultural heritage of the American Indian may be preserved and protected. Historically, NIYC has been particularly interested in issues affecting Indian youth.

The Wisconsin Potawatomies of the Hannahville Indian Community of Michigan, Sisseton-Wahpeton Sioux Tribe of North Dakota and South Dakota, Crow Tribe of

*The letter of consent is on file with the Clerk of the Court.

Indians of Montana, White Mountain Apache Tribe of Arizona, and Oneida Nation of New York are American Indian Tribes.

The Association of Village Council Presidents represents the Yupik Eskimos in fifty-six Alaska Native Villages.

The Kodiak Area Native Association represents the Aleuts of Kodiak Island, Alaska.

The Tanana Chiefs Conference represents the Athab Ascan Indians in forty-two Alaska Native Villages.

Over many years and under circumstances similar to those of the case at bar *amici* and its members and constituents (NIYC) have been the targets and victims of the same racial prejudice and cultural degradation that underlie the decisions of the Texas courts below. Such decisions have resulted in the unwarranted destruction of many Native American families and communities. To combat this reality, *amici* vigorously supported the enactment of the Indian Child Welfare Act, P.L. 95-608. The Act which essentially codifies prior court decisions, including decisions of this Court, provides an expanded tribal jurisdiction to determine the type of custody issues involved here.

Amici seek to participate in urging reversal of the decisions below in order to secure due process and equal protection for Native American families under standards that are racially and culturally nondiscriminatory. Additionally, *amici* seek to establish that Native America judicial forums should have exclusive jurisdiction under the Indian Child Welfare Act and prior judicial decisions to determine the custody of children domiciled on Indian reservations.

ARGUMENT

This case is not a typical child custody matter. Rather, at issue are questions of Indian sovereignty which have not been raised by the parties to this litigation at any stage of the proceedings.

I.

THE TEXAS COURTS BELOW LACKED SUBJECT MATTER JURISDICTION TO EITHER TERMINATE THE PARENT-CHILD RELATIONSHIP OR TO APPOINT A CONSERVATOR IN THIS CASE

The Texas courts below erred in asserting subject matter jurisdiction over this action and it is appropriate for this Court to consider the jurisdictional issue at this stage of the proceedings.[1]

This Court has long recognized the sovereignty of Indian nations and their right to regulate matters arising within the boundaries of their reservations. *Worcester v.*

[1] It is well established law that the lack of subject matter jurisdiction is never waived by either express consent, conduct, or estoppel. Wright, Miller, Cooper & Gressman, *Federal Rules of Practice and Procedure:* Jurisdiction § 1393 (1977); *Sosna v. Iowa*, 419 U.S. 393 (1975); *Mitchell v. Maurer*, 293 U.S. 237 (1934); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). Moreover, a court may take notice of the lack of subject matter jurisdiction at any stage of the proceedings on its own or upon the motion of a party. Wright, Miller, Cooper & Gressman, *supra*; *City of Kenosha, Wisconsin v. Bruno*, 412 U.S. 507 (1973). Texas law follows federal procedural law in this area. *Live Oak County v. Lower Nueces River Water Supply Dist.*, 446 S.W.2d 14 (Tex. 1969); *Phillips Petroleum Co. v. Bivins*, 423 S.W.2d 341 (Tex. 1961); *Haase v. Greutzmacher*, 521 S.W.2d 666 (Tex. 1975); *Bryan v. Bryan*, 477 S.W.2d 705 (Tex. 1972).

Georgia, 31 U.S. 515 (1832); *United States v. Quiver*, 241 U.S. 602 (1916). More recently the Court has modified the broad principles of *Worcester, supra*, and its progeny to permit states to act concerning matters arising on a reservation but only where "essential tribal relations were not involved and where the rights of Indians would not be jeopardized," *Williams v. Lee*, 358 U.S. 217, 219-220 (1959). The so-called Williams test requires a court to determine whether the assertion of the state's interest in the occurrence infringes upon the tribal right to self-government. *Williams, supra* at 228. Accord, *McClanahan v. Arizona State Tax Commissioner*, 411 U.S. 164 (1973). Most recently the Court, in *Santa Clara Pueblo v. Martinez*, 98 S. Ct. 1670, 1677 (1978), reiterated the basic *Worcester* principle that: "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher v. District Court*, 424 U.S. 382, 387-388 (1976), "may undermine the authority of the tribal court[s] ... and hence ... infringe on the right of the Indians to govern themselves." *Williams v. Lee, supra*, 358 U.S. at 223.

In 1976 the Court decided *Fisher v. District Court, supra*, a case involving the jurisdiction of the State of Montana over an adoption proceeding where all parties were residents of the Northern Cheyenne Indian Reservation and enrolled members of the tribe, and where no substantial part of conduct supporting the adoption petition took place off the reservation. The Court applied the principles enunciated in *Worcester, supra, Williams, supra*, and *McClanahan, supra*, and held that the Northern Cheyenne Tribal Court has exclusive jurisdiction over the adoption proceedings in this instance. The *Fisher* decision recognizes that Indian

self-determination includes the right of Indian tribes to resolve matters affecting the parent-child relationship where the parties are all residents of the tribal reservation in question. cf., *DeCoteau v. District Court*, 420 U.S. 425 (1975).

Other courts have applied the principles enunciated in the *Fisher* decision, *supra*, to reach similar results. *In re Lelah-Pu-Ka Chee*, 98 F. 429 (N.D. Iowa 1899); *State v. Superior Court*, 57 Wash.2d 818, 356 P.2d 985 (1960); *In re Colwash*, 57 Wash.2d 196 (1960), 356 P.2d 994 (1960). Indeed, several courts have applied the reasoning of the *Fisher* Court to a different set of facts to hold that not only does a tribal court possess exclusive jurisdiction to adjudicate custody matters pertaining to parties who reside on the reservation but, additionally, the tribal court has exclusive jurisdiction over custody matters involving Indian children who are members of a recognized tribe and who reside off the reservation but who continue to be domiciled on the reservation. *Wisconsin Potawatomies, etc. v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973); *Wakefield v. Littlelight*, 276 Md. 333, 347 A.2d 228 (1975); *In re Buehl*, 87 Wash.2d 649, 555 P.2d 1334 (1976). *Accord, In re Greybull*, 23 Or. App. 674, 543 P.2d 1079 (1975); *In re Doe*, 89 N.M. 606, 555 P.2d 906 (1976); *In re Duryea*, 115 Ariz. 86, 563 P.2d 885 (1977). At issue in *Wisconsin Potawatomies, supra, Wakefield, supra*, and *Buehl, supra*, was whether state courts had jurisdiction over custody proceedings involving Indian children who were residing off the reservation, but whose parent(s) continued to be domiciled on the reservation. The *Wisconsin Potawatomies* court, *supra*, clearly articulated the basic premise of *Fisher, supra, Wakefield, supra, Buehl, supra*, and *Greybull, supra*:

> If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity. *Wisconsin Potawatomies, supra* at 730.

Under the "Williams test" the intervention by state courts in matters concerning the custody of Indian children was viewed as a grave threat to tribal sovereignty:

> . . . there can be no greater threat to "essential tribal relations," and no greater infringement on the right of the . . . [t]ribe to govern themselves than to interfere with tribal control over the custody of their children. . . . *Wakefield, supra* at 237-238.

Implicit in the *Wisconsin Potawatomies, Wakefield,* and *Buehl* decisions is the recognition by those courts that the vast majority of Indian children who had been separated from their Indian families and communities (through both legal and illegal actions) reside with non-Indian families. Often these chidren reside in states other than where their tribal reservations are located. It was crucial, therefore, to apply jurisdictional criteria other than the residence of the parties on the reservation, so that the tribe could preserve its identity and retain its sovereignty.[2] The essential criterion established was domicile of the child:

> By using the Indian child's domicile as the state's jurisdictional basis, the Indian tribe is afforded significant protection from losing its essential rights

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[2] In most states the physical presence of a child in the state is sufficient to satisfy the jurisdictional requirement. However, different criteria have been established for Indian children because of the unique status of Indian people in American society and the threat to tribal identity. See Argument II, *infra*.

of child-rearing and maintenance of tribal identity. *Wakefield, supra* at 238.

In *Wisconsin Potawatomies, Wakefield,* and *Buehl,* the parent upon whom the child's domicile was contingent remained domiciled on the Indian reservation at all times. Moreover, the children who were the subject of the litigation had also resided on the reservation although, at the time of the litigation, they had been residing off the reservation for substantial periods of time and even in states other than where their Indian reservations were located. *Wakefield, supra; Buehl, supra.* See *Greybull, supra, Doe, supra,* and *Duryea, supra,* where the courts accepted the validity of the domicile approach but determined that the children who were the subject of the litigation were not domiciled on the reservation. Nor is the Court's decision in *DeCoteau, supra,* dispositive of the jurisdictional issue presented in this case. *DeCoteau* cannot be properly characterized as an Indian child custody jurisdictional case. Rather, it is a reservation disestablishment case. Nevertheless, the *DeCoteau* Court never reached the jurisdictional issue, but merely decided that the land in question was not an Indian reservation.

The results reached in *Wisconsin Potawatomies, Wakefield,* and *Buehl,* and concurred to in *Greybull, Doe* and *Duryea,* have recently been endorsed by the United States Congress in enacting the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* (1978), which was signed into law by President Carter on November 8, 1978. In enacting this legislation Congress responded to the alarming trend which has threatened and continues to threaten the survival of Indian communities in the United States—the unwarranted intrusion into Indian family life and the removal of Indian children at alarming rates by public and private agencies, and occasionally sanctioned by

some courts.[3] The legislative history of the Indian Child Welfare Act reflects that Congress is concerned that the high rate of separation of Indian children from their families and communities is the result of a cultural bias that Indian people would be better off living in a non-Indian setting.[4]

By establishing minimum federal standards for the removal of Indian children from their communities it is the intent of Congress "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," § 3, 25 U.S.C. § 1902 (1978). Several provisions of the Act are relevant to the present litigation. Specifically, § 101(a), 25 U.S.C. § 1911 (1978), provides:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.[5]

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[3] See Argument II, *infra.*

[4] See generally legislative history of S. 1214 which includes: H.R. Rept. No. 95-1386, 95th Cong., 2d Sess. (1978); S. Rept. No. 95-597, 95th Cong., 1st Sess. (1977); Indian Child Welfare Act of 1977, Hearing Before the Select Committee on Indian Affairs, United States Senate, 95th Cong., 1st Sess. (1977); Task Force Four Report on Federal State and Tribal Jurisdiction, Report to the American Indian Policy Review Commission, 94th Cong., 2d Sess. (1976); and, Indian Child Welfare Program, Oversight Hearing Before the Subcommittee on Indian Affairs, United States Senate, 93rd Cong., 2d Sess. (1974).

[5] While most of the provisions of § 25 U.S.C. § 1901 *et seq.* (1978) do not become effective until May 7, 1978, § 101(a), 25

[footnote continued]

And, § 110, 25 U.S.C. § 1920 (1978), provides:

> Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

Given this background, it is clear that the Texas courts below erred in asserting subject matter jurisdiction over this action. The record before this Court shows that in 1971 Petitioner's marriage to Bernard C. Butts, Jr., was annulled because Petitioner learned that her "husband's" marriage to his first wife had not been legally terminated, and Petitioner assumed legal custody of their eighteen months old child, Tiffany. Testimony of Bernadine Rose Brokenleg, Statement of Facts, page 63. Subsequently, Petitioner and her child moved to the Rosebud Sioux Indian Reservation where they are both enrolled members of the Rosebud Sioux Tribe. Petitioner's Brief for Certiorari at 3. Tiffany lived with her mother on the reservation from May, 1972 until July, 1973 when Bernard C. Butts, Jr., and his parents removed the child

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U.S.C. §1911 is currently in effect. Section 113, 25 U.S.C. §1923. Clearly, the Court should take into consideration this provision of the Indian Child Welfare Act in reaching a decision on the jurisdictional issue in question. *Cort v. Ash*, 422 U.S. 66, 77 (1975); *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974); *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 282 (1969); *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801).

from the reservation, *Brokenleg v. Butts*, 559 S.W.2d 853, 855 (Tex. Civ. App.-El Paso 1977). Petitioner has continuously resided on the Rosebud Sioux Reservation since May, 1972. 559 S.W.2d at 855.

Domicile of an Indian child is the exclusive criterion for determining whether a state court or a tribal court has jurisdiction over matters affecting the parent-child relationship. *Wisconsin Potawatomies, supra; Wakefield, supra; Buehl, supra; Indian Child Welfare Act, supra.* See *Fisher, supra; DeCoteau, supra; Greybull, supra; Doe, supra; Duryea, supra.* And, regardless of state law to the contrary, *Wakefield, supra* at 237.

The general rule is that the domicile of a child upon divorce or separation is the same as that of the parent who obtains legal custody of the child. RESTATEMENT (Second) OF CONFLICTS § 22, Comment & Illustration 1 (1971). Logically, the rule to determine domicile of a child upon annulment follows that for divorce or separation. Tiffany's domicile is contingent upon the domicile of her mother. Despite Tiffany's physical presence in Texas, she continues to be domiciled on the Rosebud Sioux Indian Reservation. As a domiciliary of the Rosebud Sioux Indian Reservation, and in accordance with the decisions of this Court and the courts cited above, and reaffirmed by recent Congressional mandate, the Texas courts below lacked subject matter jurisdiction over this action. The Rosebud Sioux Tribal Court possesses exclusive jurisdiction in matters relating to the custody of Tiffany Butts.

II.

THE DECISIONS BELOW DENY PETITIONER THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO RAISE HER FAMILY ACCORDING TO ROSEBUD SIOUX FAMILIAL AND CULTURAL TRADITIONS

The Court of Civil Appeals rejected all of the District Court's abandonment and neglect findings but nevertheless affirmed the district Court's custody award on the ground that Respondents have "a more stable home" than Petitioner, *Brokenleg v. Butts,* 559 S.W.2d at 857, a "fact" not expressed by the District Court. Indeed, the Court of Civil Appeals appears to be merely restating the District Court's Findings of Fact 6 and 7, only in a more acceptable manner. See Findings of Facts and Conclusions of Law, Appendix D, Petitioner's Brief for Certiorari at 22a-24a. The insensitivity towards Indian familian and cultural traditions manifested by the statements of the courts below is not unique. The legislative history to the Indian Child Welfare Act is replete with examples of the removal of Indian children from their families and communities by public and private agencies because these agencies have no way to evaluate intelligently the cultural and societal premises underlying Indian home life.[6] Additionally, these agencies are either ignorant of Indian cultural traditions or contemptuous of them.[7] The racial bias exhibited by non-Indian social workers has resulted in the separation of Indian children from their families at an alarming rate.[8] The Association on American Indian

[6] See generally Indian Child Welfare Act of 1977, Hearing on S. 1214 before the United States Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess. (Aug. 4, 1977).

[7] *Id.*

[8] *Id.*

Affairs (hereinafter referred to as AAIA) has conducted in recent years statistical surveys documenting the extent of this threat to the survival of Indian communities in the United States. In 1969 and 1974 surveys in states with large Indian populations[9] revealed that twenty-five percent to thirty-five percent of all American Indian children are separated from their families and reside in foster homes, adoptive homes or institutions.[10] Moreover, in the sixteen states AAIA surveyed in 1969[11] approximately eight-five percent of all American Indian children in foster homes were living with non-Indian couples.[12] The comparison of rates of removal of Indian children from their families as contrasted with the rates of removal of non-Indian children from their families reveals another shocking statistic. An AAIA 1976 survey, conducted at the request of the American Indian Policy Review Commission, an agency of the United States Congress, shows that, for example, in Maine the per capita rate for foster placement is nineteen times greater for Indian than for non-Indian children and of these placements, sixty-four percent are with non-Indian families.[13] The ratio of American Indian foster care placement in Minnesota is at least seventeen times greater

[9] The states surveyed included: Oklahoma, Arizona, Minnesota, South Dakota, Washington, and Wisconsin.

[10] Hearing on S. 1214, *supra* note 6, at 187 (Statement of Rena Uviller).

[11] The states surveyed included: Alaska, Arizona, California, Idaho, Michigan, Minnesota, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wisconsin.

[12] H.R. Rep. No. 1386, 95th Cong., 2nd Sess. at 9 (1978).

[13] Hearing on S. 1214, *supra* note 6, at 565 (Appendix G, AAIA Statistical Survey).

than for non-Indians,[14] and in South Dakota it is approximately twenty-two times greater.[15] In a study conducted on a North Dakota Indian reservation it was reported that non-Indian social workers removed Indian children from their families for reasons of "child abuse" in only one percent of the cases and for the remaining ninety-nine percent such vague grounds as "neglect" or "social deprivation" were cited.[16] Children were labeled "neglected" if, for example, they were left for a period of time with a member of the extended family, a commonplace childrearing practice sanctioned and encouraged by the Indian community.[17] Methods of discipline among Indian people also vary from those understood by non-Indian social workers and Indian parents are penalized by having their children removed from them because they are too "permissive."[18]

The Court has recognized the fundamental rights of parents to raise their offspring in accordance with their own convictions and precepts. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 32 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). See also *Moore v. City of East Cleveland, Ohio*, 431 U.S. 158 (1944); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Carey v. Population Services International*, 431 U.S. 678 (1977). These decisions construe this fundamental right of parents as both a concept of personal liberty and

[14] *Id.* at 570-571.

[15] *Id.* at 592-593.

[16] H.R. Rep. No. 1386, *supra* note 12, at 10.

[17] *Id.*

[18] *Id.*

privacy protected by the Due Process Clause from governmental intrusion absent a compelling reason. The removal of Indian children from their families whether by non-Indian social workers or by non-Indian courts where the sole motivation is one of racial bias is to deny those Indian families of the fundamental constitutional right to raise their children according to traditional familial and cultural values.

It is precisely this personal liberty or privacy interest which Congress appears to be attempting to protect in enacting the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* (1978). And, it is precisely this right of personal liberty or privacy which the Texas courts, in the instant action, chose to ignore by refusing to return Tiffany to Petitioner. Implicit in the decisions of the courts below is the belief that all children are better off growing up in a non-Indian setting and, especially, if a child exhibits non-Indian physical features, regardless of the child's Indian blood and tribal membership. The decisions of the Texas courts, to award Tiffany's custody to her non-Indian paternal grandparents evidence a contempt for Indian society and cultural values and in so doing intrudes on Petitioner's fundamental right to raise her child according to the traditions and customs of the Rosebud Sioux Indian society. Nor is any compelling state interest advanced by the Texas courts to justify the intrusion, such as the unfitness of Petitioner. See Findings of Facts and Conclusions of Law, Appendix D, Petitioner's Brief for Certiorari at 22a-24a; and, 559 S.W.2d at 857. Indeed, the racial overtones and cultural bias exhibited by the courts below was cited as an example of the necessity for enacting the Indian Child Welfare Act by Representative Morris Udall during his

speech on the floor of the United States House of Representatives in which he urged passage of the Act. 124 *Cong. Rec.* H12,849 (daily ed. Oct. 14, 1978).

CONCLUSION

Since the courts below lacked subject matter jurisdiction over this action pursuant to principles of Indian sovereignty law as interpreted by case law and recent Congressional mandate or, in the alternative, because the decisions below interfere with Petitioner's fundamental constitutional right to raise her child according to Rosebud Sioux familial and cultural traditions this Court is urged to issue a writ of certiorari to the Court of Civil Appeals of Texas, El Paso and also to reverse summarily the custody decision of that court and the District Court.

Respectfully submitted,

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MOTION FOR LEAVE TO PROCEED AMICUS CURIAE BY THE ROSEBUD SIOUX TRIBE AND MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION

Terry L. Pechota, attorney for amicus curiae, Rosebud Sioux Tribe, moves this Court for an Order allowing the Rosebud Sioux Tribe to file a memorandum in support of the Petition for Writ of Certiorari to the Court of Civil Appeals of the State of Texas, El Paso. The interest of amicus curiae in this proceeding is more specifically set out below.

INTEREST OF AMICUS CURIAE

The Rosebud Sioux Tribe is a federally recognized Indian Tribe having its business office on the Rosebud Indian Reservation in South Dakota. *Rosebud Sioux Tribe v. Kneip*, 97 S.Ct 1361 (1976). It is the principal governing authority over Indians residing on the Rosebud Indian Reservation. Approximately 8,000 Rosebud Sioux Indians reside on the reservation.

The governing authority of the Rosebud Sioux Tribe is the Rosebud Sioux Tribal Council. The Tribal Council has promulgated a Tribal Law and Order Code. Both the Constitution and the Law and Order Code contain provisions for the regulation of domestic relations of Rosebud Sioux tribal members. Article IV, §1(p) and (q) of the Rosebud Sioux Tribal Constitution and Rosebud Sioux Tribal Resolution 77-21 (adoptions). Child custody matters are regularly decided by the Rosebud Sioux Tribal Court. *See Fisher v. District County Court*, 96 S.Ct. 943 (1976).

As the governing authority of Rosebud Sioux tribal members residing on the reservation, the Rosebud Sioux Tribe has the ultimate concern for the welfare of Rosebud Sioux tribal members. The Tribe recognizes that membership is its most important resource. Thus the Rosebud Sioux Tribe constantly strives to keep Indian families united and afford all who desire a comfortable place to live on the Rosebud Sioux Indian Reservation.

Any finding by any court wherever situated that it is detrimental to raise a child on the Rosebud Indian Reservation or that a tribal member with certain physical features could not be raised naturally on the Rosebud Indian Reservation causes the Tribe serious concern. If such a finding is allowed to remain in existence and be perpetrated, then the deathblow has been dealt and in a short period of time the Rosebud Sioux Indian Reservation could very well cease to exist.

Amicus, Rosebud Sioux Tribe, respectfully adopts, for purposes of this memorandum, the material in the Petition under the headings "Opinions Below", "Jurisdiction", "Questions Presented", "Constitutional and Statutory Provisions Involved", and "Statement of the Case."

ARGUMENT

The Rosebud Sioux Tribe as amicus curiae adopts as its own the reasoning set forth under Sections I and III of the Petition For A Writ of Certiorari. In this memorandum, amicus will direct its argument to further elaborate on Section II of the Petition For A Writ Of Certiorari.

I.

IT IS NOT DETRIMENTAL OR DANGEROUS FOR ANY CHILD TO BE REARED ON THE ROSEBUD SIOUX INDIAN RESERVATION.

In Finding of Fact number 6, the trial court found that it would be dangerous to the physical and emo-

tional well-being of Tiffany Lynette Butts for her to be returned to the Rosebud Reservation to be raised by her mother.

There was no evidence presented in the lower court supporting the finding encompassed in Finding of Fact number 6. Yet the lower court found that the Rosebud Indian Reservation would pose a danger to Tiffany Lynette Butts if she was returned there to be raised. It is one thing to say that certain conditions relevant to a particular child are not in its best interest, which was not found either by the lower court or appellate court, and quite another to draw from the fact of a reservation the conclusion that a child cannot be raised without danger thereon. The fact of a reservation simply is not the cause of the former; the latter, with all due respect, seems to be a typical, non-Indian stereo-typed characterization of an Indian reservation.

The United States Government, which has plenary power over Indian affairs, *Williams v. Lee*, 358 U.S. 217 (1959), at the present time is affecting a policy of Indian self-determination with respect to Indian affairs. Pub.L. 93-638, §2, 88 Stat. 2203, 25 USC §450. Indian people on reservations across the country are being given responsibility for their own governance. The United States Government, instead of attempting to destroy Indian reservations, has recognized that Indian people want to keep their land and raise their children in the Indian way. *See e.g.* Senate Bill 1214, 95 Cong., 1st Sess., April 21, 1977. Quality of life on the Rosebud Indian Reservation exceeds that which exists

on areas outside of the reservation. Moreover, it is accentuated by the existence of the Rosebud Sioux culture and tradition. Sioux culture and tradition shapes the everyday living patterns and government on the Rosebud Indian Reservation.

To say that the Rosebud Indian Reservation is dangerous to the welfare of Tiffany Lynette Butts is belied by the state of affairs on the Rosebud Indian Reservation. A well equipped, well trained, and well manned police department administered by the United States through its Bureau of Indian Affairs keeps the law and order on the Rosebud Indian Reservation. A child protection team constantly monitors the welfare of all children on the Rosebud Indian Reservation. New housing units are in the process of being built to meet the housing needs of all Rosebud Sioux Tribal members. A Public Health Service Hospital attends to the medical needs of those tribal members unable to afford private treatment. Legal services are available to those unable to retain private counsel. Other services available to reservation residents, such as the following, further provide to a quality life for reservation residents: Alcoholism Treatment Program, Ambulance Service, Community Action Program, Comprehensive Employment and Training Program, Sinte Gleska Community College, Comprehensive Health Representative Program, Day Care Center, Delta Marie Home for Disadvantaged Children, Economic Development Program, Follow Through Program, Public Schools, Food Service Program, Head Start Program, Home

Improvement Program, Mortuary Service, and National Indian Highway Safety Program. All tribal members are entitled to the services of the Bureau of Indian Affairs, which provides a plethora of human services. The economic and social climate on the Rosebud Sioux Indian Reservation lends itself to providing a high quality of life for any child.

It is significant to point out, in addition to all of the above, that a psychiatrist testified in the lower court that life on an Indian Reservation is sophisticated and rich in values important to children, TT. 105, and that to not return Tiffany to her mother, her culture, and her people would be deleterious to her future growth and development. TT. 103.

The Rosebud Sioux Tribe submits to the Court that there simply is no basis in fact for any court to make the determination that Tiffany Lynette Butts or any child would be endangered in any way if raised on the Rosebud Sioux Indian Reservation.

II.

IT IS NOT DETRIMENTAL AND DANGEROUS FOR A TRIBAL MEMBER WITH SOME NON-INDIAN FEATURES TO BE RAISED ON THE ROSEBUD SIOUX INDIAN RESERVATION.

The lower court found in Finding of Fact number 7 that Tiffany Lynette Butts possessed some non-Indian features and hence to require her to be raised on the Rosebud Indian Reservation would be unnatural, deleterious, and dangerous.

Finding of Fact number 7, other than the trial

court's observation of the child, has no basis in fact, either in the record or otherwise. To the extent that the trial court did observe that Tiffany Lynette Butts did possess non-Indian features, such determination is subjective. Whether one possesses non-Indian features above all is relative. More importantly, the conclusion drawn by the trial court from its observation reflects a highly uninformed attitude about life and the state of affairs on an Indian reservation.

The Rosebud Sioux Nation, which occupies the Rosebud Indian Reservation, is comprised of in excess of 8,000 enrolled members. Article II, Section 1 and 2 of the Rosebud Sioux Tribal Constitution sets forth the requirements for enrollment in the Rosebud Sioux Tribe:

Section 1: Membership of the Rosebud Sioux Tribe shall consist as follows:

(a) All persons of Indian blood, including persons born since December 31, 1920, whose names appear on the official census roll of the tribe as of April 1, 1935.

(b) All persons born after April 1, 1935, and prior to the effective date of this amendment, to any member of the Rosebud Sioux Tribe who was a resident of the reservation at the time of the birth of said persons.

(c) All children of one-fourth or more Rosebud Sioux Indian blood born after the effective date of this amendment to a member of the tribe, regardless of the residence of the parent.

Section 2: The Tribal Council shall have power to promulgate ordinances, subject to review by the Secretary of the Interior, covering future membership and the adoption of new members.

As can be seen from the above, one does not have to be a full blood Indian to be enrolled. There are substantial numbers of persons enrolled who are of 1/16 and 1/32 degree Indian blood. Many enrolled members do not possess stereotyped Indian features. Nevertheless, each person enrolled is recognized as a Rosebud Sioux by the Federal Government, Rosebud Sioux Tribe, and the Indian people that he lives among. Rosebud Sioux persons of 1/16 blood live side by side with those persons who are full blooded. It is not the degree of Indian blood or Indian features that determine whether an Indian is accepted as an Indian by reservation residents but rather whether the person considers himself to be an Indian. Moreover, approximately 40% of the population of the Rosebud Sioux Indian Reservation is comprised of non-Indians. It is plainly inaccurate to say that because an Indian has blue eyes or light hair or complexion that he cannot become accepted as an Indian person on the Rosebud Indian Reservation or that it would be unnatural for the person to be raised thereon.

CONCLUSION

The Court of Appeals found no evidence to support any of the other District Court findings. Thus, the decision to appoint Respondents as managing conservators

of Tiffany Lynette Butts was based entirely on Findings of Fact numbers 6 and 7. Those Findings by the District Court have no basis in fact and above all are erroneous. Tiffany Lynette Butts should be returned to her mother to be raised on the Rosebud Indian Reservation and hence the Petition For Certiorari should be granted to correct the manifest injustice and affront to the Rosebud Sioux Tribe and its people which is encompassed by the decision of the District Court and Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Terry L. Pechota, Attorney for the Rosebud Sioux Tribe, certifies that on the 22nd day of September, 1978, he mailed a true and correct copy of Amicus Curiae's Motion And Memorandum to John Lee, Attorney for Petitioners, Box 766, Kermit, Texas 79745, Michael Fostel, Box 1015, Kermit, Texas 79745, and to Bertram Hirsch, Attorney for Respondent, 432 Park Avenue South, New York City, New York 10016.

Terry L. Pechota

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No. 78-25

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

BERNADINE ROSE BROKENLEG,
Petitioner,
v.
BERNARD C. BUTTS, SR., *et ux.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Texas, El Paso

MOTION OF THE AMERICAN ACADEMY OF CHILD PSYCHIATRY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE AMERICAN ACADEMY OF CHILD PSYCHIATRY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Academy of Child Psychiatry ("the Academy") hereby respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari in this case. Consent to the Academy's filing of a brief was obtained from the attorney for the petitioner, but the requested consent of the attorney for respondents was refused.

The American Academy of Child Psychiatry is a national professional organization of over 2,100 child psychiatrists whose expertise and professional interests focus on the mental health of the nation's children. Through its Committee on the American Indian Child, the Academy has long been concerned with the plight of American Indian children who are removed from their biological parents and Indian communities. In 1974, representatives of the Academy testified before the Senate subcommittee on Indian affairs, to urge the enactment of legislation to end or substantially reduce the incidence of such removal. The Academy adopted a formal position paper on the placement of American Indian children in January 1975,[1] and in April 1977 sponsored a national conference on "Supportive Care, Custody, Placement and Adoption of American Indian Children," the proceedings of which have been published and circulated widely. In August 1977 a representative of the Academy testified, before the Senate Select Committee on Indian Affairs, in favor of the subsequently adopted Indian Child Welfare Act.

Statistics show that an astoundingly high percentage of American Indian children are removed by government authority from the custody of their biological parents. Surveys conducted in 1969 and 1974 by the Association on American Indian Affairs indicated that approximately 25 to 35 percent of all American Indian children have been so separated from their parents. *See* Comment, *The American Indian Child-Welfare Crisis: Cultural Genocide or First Amendment Preservation*, 7 Colum. Human Rights L. Rev. 529 (1975). Figures compiled in 1976 for South Dakota, the home state of the petitioner in this case, reveal that in that state 22.4 times as many Indian children as non-Indian children were removed from their natural parent(s) and placed

[1] This position paper was submitted to the Senate subcommittee.

in foster care homes or institutions. *See* S. Rep. No. 597, 95th Cong., 1st Sess. 49 (1977). *See generally id.* at 11, 44, 46-50. These statistics also show that, when removed from their parents, Indian children are usually placed with non-Indians. *Id.*

The Academy believes that decisions to remove Indian children from their biological parents and Indian communities have often been made by agencies and courts improperly influenced by their own personal views of the social, cultural, and economic components of a "good home" and that placement decisions following removal have been carried out by agencies and courts unaware of the psychological, developmental, and cross-cultural problems involved in removing Indian children from their Indian community environment. The experience of Academy members and other clinical evidence suggest that Indian children placed in off-reservation non-Indian homes are at risk in their later development, even when they are cared for by devoted and well-intentioned foster or adoptive parents. These children typically have come to believe that something is wrong with their own parents and their Indian heritage. Particularly during adolescence, they often experience ethnic confusion and a pervasive sense of abandonment, with consequent detrimental effects on their own lives and on their capacities to become good parents.[2]

The case at bar dramatically illustrates the kinds of improper considerations on which removal and placement decisions with respect to Indian children have frequently been based.[3] The Academy's interest in the present case,

[2] These views of the Academy have received general endorsement from Congress. *See* S. Rep. No. 597, 95th Cong., 1st Sess. 12, 52 (1977); 124 Cong. Rec. H12,848-50 (daily ed. Oct. 14, 1978) (remarks of Reps. Udall and Lagomarsino).

[3] The trial court's decision even achieved quotation during Congressional debate as an example of the shocking grounds relied on to remove Indian children from their parents. *See* 124 Cong. Rec. H12,849 (daily ed. Oct. 14, 1978) (remarks of Rep. Udall).

however, transcends its special concern for the Indian parents and children affected by such decisions. The decision of the court below has grave implications for parents and children from other minority and disadvantaged groups, and indeed for parents and children generally insofar as it holds that parents may be deprived of custody of their children without any showing that the parents are or have been "unfit" parents in any sense of the term.

The Academy seeks leave to proceed as *amicus curiae* in order (1) to emphasize the importance, from the standpoint of the psychological well-being of the child, of maintaining custody with his or her natural parent absent a showing that the parent is no longer fit to have custody, and (2) to suggest the kinds of considerations which, from a psychological point of view, should be taken into account in determining whether the natural parent is fit to maintain custody.

Respectfully submitted,

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February 1979

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BRIEF AMICUS CURIAE FOR AMERICAN ACADEMY OF CHILD PSYCHIATRY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

As stated in its motion for leave to file this brief, *amicus curiae* American Academy of Child Psychiatry ("the Academy") is a national professional organization of over 2,100 child psychiatrists whose expertise and interests focus on the mental health of the nation's children.

Through its Committee on the American Indian Child, the Academy has long been concerned with the plight of American Indian children who are removed from their biological parents and Indian communities. The Academy has demonstrated this concern by testifying before Congressional committees, by sponsoring a national conference on the placement of American Indian children, and by publishing both the proceedings of this conference and a formal position paper.

The Academy believes that this case has grave implications for American Indian children, and for children and parents generally. As *amicus curiae*, the Academy seeks (1) to emphasize the importance, from the standpoint of the psychological well-being of the child, of maintaining custody with his or her natural parent absent a showing that the parent is no longer fit to have custody, and (2) to suggest the kinds of considerations which, from a psychological point of view, should be taken into account in determining whether the natural parent is fit to maintain custody.

REASONS FOR GRANTING THE WRIT

The decision of the Texas Court of Civil Appeals raises constitutional issues of great importance. Its holding conflicts directly with decisions of this Court regarding the due process rights of parents. The findings on which the trial court based its decision, moreover, and which the appellate court implicitly endorsed in upholding the decision to deprive petitioner of custody of her daughter, demonstrate that the decisions below were based on impermissible racial considerations. Because of these violations of constitutional rights and the beneficial impact that clarification of these rights would have on child placement decisions generally, the Academy urges the Court to grant the writ of certiorari.

A. The Decision Below Conflicts with Decisions of this Court as to the Due Process Rights of Fit Parents to Custody of their Children

This Court has long recognized that the liberty guaranteed by the Fourteenth Amendment embraces the right "to marry, establish a home and bring up children." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). *See also Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-35 (1925) (liberty of parents to direct upbringing of children); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942) (right to marry and procreate). In 1944, the Court summarized as follows its previous decisions with respect to the rights of parents and their families:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

Among the constitutionally protected interests within the "private realm of family life" which this Court has explicitly recognized are parents' rights to the "care, custody, management and companionship" of their own children, rights which the Court has characterized as "far more precious . . . than property rights." *May* v. *Anderson*, 345 U.S. 528, 533-34 (1953).

Of course, parents' rights to the "care, custody, management and companionship" of their children are not absolute. Parents have certain duties correlative to their rights, and a state may intervene in a parent-child relationship upon a showing of a countervailing state interest appropriate to the degree of intervention sought. *See, e.g., Meyer* v. *Nebraska, supra*, 262 U.S. at 400; *Prince* v. *Massachusetts, supra*, 321 U.S. at 166; *Wis-*

consin v. *Yoder*, 406 U.S. 205, 233-34 (1972); *Quilloin* v. *Walcott*, 434 U.S. 246, 248 (1978).

This Court has explicitly recognized, however, that a state's interest in interfering with a parent's right to the custody of his or her own child is "*de minimis*" if the parent is shown to be "fit." *Stanley* v. *Illinois*, 405 U.S. 645, 657-58 (1972). Indeed, in *Stanley* the Court flatly held that a state may not deprive a natural parent of the right to custody of his or her child unless it has been determined, after an appropriate hearing, that the parent is unfit to be the child's custodian. *Id.* at 649, 658. As the Court later put it in *Quilloin* v. *Walcott*, *supra*, 434 U.S. at 247-48:

> "In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), this Court held that the State of Illinois was barred, as a matter of both due process and equal protection, from taking custody of the children of an unwed father, absent a hearing and a particularized finding that the father was an unfit parent."

In *Quilloin* the Court also adopted, in a unanimous opinion, the earlier observation of Justice Stewart:

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 862-863 (1977) (Stewart, J., concurring in judgment.)" *Id.* at 255.[1]

[1] The cases cited above all emphasize the rights of parents. As this Court has increasingly recognized in a variety of contexts, children also have certain rights. *Cf.* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) ("[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights"). *See generally In re* Gault, 387 U.S. 1 (1967); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Goss v. Lopez, 419 U.S. 565 (1975); Breed v. Jones, 421 U.S. 519 (1975). The nature and extent of the rights of children in family matters is very unclear, however. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 692 (1977) (opinion of Brennan, J.) (there is greater scope for state's exercise of authority over minors); Smith v. Organization of Foster Families, 431 U.S. 816, 840-41 (1977) (children have no due process rights with respect to foster relationships). This case provides the Court with an opportunity to clarify the rights, if any, of children involved in custody proceedings.

This Court has never been called upon to define the kinds of factors which a state may, consistent with the requirements of due process, take into account in determining whether natural parents are "unfit" to maintain custody of their children. Of course, recognition has traditionally been given to abuse, abandonment, and neglect as criteria of unfitness and therefore as grounds for depriving parents of their children's custody. *See, e.g.*, *Stanley* v. *Illinois*, *supra*, 405 U.S. at 652. The Academy respectfully submits, however, that there are also other factors which a state should take into account in determining a parent's fitness to maintain custody and that consideration of such factors is not precluded by due process considerations.

In the present case, for example, the Texas courts should have explored, with the assistance of thorough psychiatric examinations of both petitioner and her daughter, questions such as:

(1) the extent to which petitioner presently can satisfy her daughter's psychological needs or once had a positive psychological bond with her child which could be reestablished;

(2) the extent to which petitioner's daughter is likely to suffer adverse long-range psychological effects if she is cut off from her natural mother and her Indian heritage;

(3) the extent to which petitioner has the capacity to meet her daughter's social and cultural needs,

especially in light of her daughter's heritage; and

(4) the extent to which petitioner's daughter has formed a positive psychological bond with her grandparents and whether disruption of grandparental custody is likely to cause her severe long-range psychological harm.

It is clear from the record in this case, however, that the courts below applied neither the traditionally recognized standards of abuse, neglect, and abandonment to determine whether petitioner is unfit to have custody of her child nor any of the special considerations which the Academy believes should also have been taken into account in this case. On the contrary, the trial court took the position that petitioner's fitness as a mother was not even in issue (Appendix C, p. 18a[2]), and the Court of Civil Appeals set aside as unsupported by the record the only findings of the trial court which even suggested abandonment or neglect (Appendix C, pp. 15a-16a).[3] Nor did the courts below find that petitioner's daughter had established a psychological bond with her grandparents, much less that the importance of preserving any such bond outweighed other factors, such as the psychological harm that she might suffer by being cut off from her natural mother and her Indian heritage.

In short, the courts below denied petitioner custody of her child without any finding that she was unfit under *any* standard of fitness. Indeed, the Court of Civil Appeals flatly stated that:

[2] References to Appendix C are to the Judgment and Opinion of the Texas Court of Civil Appeals, as printed in Appendix C to the Petition For a Writ of Certiorari.

[3] Although the Court of Appeals also reversed the termination of petitioner's parental rights on the ground that the evidence provided no basis for such termination, it affirmed the grant of custody to the grandparents.

". . . a parent-child relationship may be terminated even though there is no proof or finding of unfitness on the part of the parent to remain as a parent." Appendix C, p. 16a.

The decision below is thus directly at odds with this Court's holding in *Stanley*.[4] The Court of Appeals compounded its error, moreover, by ignoring petitioner's request to set aside the findings on which the trial court based its award of custody to the grandparents. As we point out in part B below, those findings clearly reveal that the trial court's decision was based on impermissible racial considerations, in violation of the equal protection clause of the Fourteenth Amendment. In view of the fact that the appellate court declined to set these findings aside, it must be deemed to have adopted them as a basis for its conclusion that the grandparents had a more stable home and were better able than petitioner "to provide for the physical, mental and spiritual needs" of her daughter. (Appendix C, p. 18a.)[5]

What emerges from the record of this case is a clear picture of courts deciding the placement of a child on the basis of the judges' own values, norms, and biases instead of on the legal principles enunciated by this

[4] The reversal of the trial court's termination of parental rights obviously does not cure the conflict with *Stanley*, since the appellate court affirmed the grant of custody to the grandparents and thus deprived petitioner of one of her most important parental rights without a finding of unfitness.

[5] With respect to the "spiritual needs" of petitioner's daughter, it is worth noting that the hearing transcript shows a preoccupation, both by the trial court and by counsel for the grandparents, with the fact that the grandparents would give her a "Christian" rather than an Indian religious education. (*See, e.g.*, Statement of Facts (Transcript of Hearing Before Trial Court), pp. 12, 46, 60, 135.)

With respect to the "mental needs" of petitioner's daughter, the only evidence was the testimony of a psychiatrist that those needs would be served best by the reunion of petitioner and her daughter. (Statement of Facts (Transcript of Hearing Before Trial Court), pp. 102-05.)

Court. The decision below obviously has far-reaching implications and, if allowed to stand, would pose a serious threat to the privacy and integrity of many families. Certainly all Texas parents belonging to socio-economic, cultural, ethnic, or ideological minorities would stand in jeopardy of one day losing custody of their children. For if, as the court below held, parents may be deprived of custody of their children without any showing that they are in any way unfit, there would be nothing to prevent courts from concluding that children of such parents, or indeed of *any* parents, should be placed in the custody of others who are found, on the basis of the judges' own socio-economic and religious beliefs and values, to be better able to provide for the material and spiritual needs of the children.[6]

B. The Decision Below Denies Petitioner Equal Protection of the Laws

The trial court based its decision on eight findings of fact, some of which were set aside by the Court of Appeals. Of the findings which the appellate court failed to set aside, the following were obviously critical to the trial court's decision to deny petitioner custody of her daughter:

> ". . . [T]o return the child to Respondent's custody to be reared on an Indian Reservation would be detrimental and endanger the physical and emotional well-being of said child."
>
> "The child has physical features, as observed by the Trial Court, of a non-Indian nature and her return to an environment consisting of primarily Indian people would subject her to being reared under unnatural conditions that would be detrimental and endanger her emotional wellbeing." Appendix D, p. 23a.[7]

[6] Particularly at risk would be parents who, out of genuine concern and love for their children, conclude that it would be best for their children to live temporarily with relatives or friends. *Cf.* Moore v. City of East Cleveland, 431 U.S. 494, 505-06 (1977) (Powell, J.).

By failing to set these findings aside in affirming the trial court's custody decision, the Court of Appeals implicitly endorsed them as the central basis for its determination. As a result, its decision, like that of the trial court, is based heavily on petitioner's race, the racial environment of the Indian reservation where petitioner lives, and the racial characteristics of her daughter.

The decision below is thus plainly repugnant to principles long established by this Court, which has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)." *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). In *Korematsu* v. *United States*, 323 U.S. 214 (1944), for example, the Court pointed out that classifications based on race are "immediately suspect" under the equal protection clause, that "courts must subject them to the most rigid scrutiny," and that they can be justified only by "[p]ressing public necessity." *Id.* at 216. *See also, e.g.*, *Loving* v. *Virginia*, *supra*, 388 U.S. at 10; *McDonald* v. *Board of Election*, 394 U.S. 802, 807 (1969); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). The law is thus clear that any governmental determination based on a person's Indian race is inherently suspect and can be justified only by a demonstration that such a determination is necessary to the promotion of a compelling state interest. *See Craig* v. *Boren*, 429 U.S. 190, 208 n.22 (1976).

[7] References to Appendix D are to the Findings Of Fact And Conclusions Of Law of the trial court, as printed in Appendix D to the Petition for a Writ of Certiorari.

The courts below identified no such compelling state interest which might justify the racial basis for their decisions and none is even remotely suggested in the record. There certainly was no evidence in the record to support the findings that, if petitioner's daughter were reared by her mother on an Indian reservation, her physical and emotional well-being would be endangered. On the contrary, as noted in part A, the courts below completely failed to explore the likely psychological effects on petitioner's daughter of placement in her mother's custody, just as they failed to explore the likely psychological effects of cutting her off from her mother and her Indian heritage. The courts did explore the asserted lack of certain physical amenities on the Indian reservation (Appendix C, p. 13a), but that consideration obviously is insufficient to support the quoted findings.

Nor is there any evidence in the record that would support the more specific conclusion that petitioner's daughter would suffer emotional harm if raised in a primarily Indian community because she had "physical features . . . of a non-Indian nature." That finding rests solely on judicial notice of the child's features plus an unsupported and unwarranted assumption about the effects of growing up in a racially mixed community. As one court has correctly pointed out, the racial differences between a child and the community in which he or she is raised "can never amount to sufficient harm to justify a constitutional termination" of parental custody. *Roe* v. *Conn*, 417 F. Supp. 769, 781 (N.D. Ala. 1976).

The racial distinctions drawn by the courts below cannot be shown to serve any rational purpose whatsoever, much less a compelling state interest of the kind necessary to justify such distinctions. To deny a fit mother custody of her daughter because of her race, the racial composition of the community in which she lives, and the racial features of her daughter is to deny both her

and her daughter the equal protection of the laws in flagrant disregard of the principles established by this Court.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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